Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TIMOTHY GIBLER,
Petitioner,

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Petitioner, Timothy Gibler, asks this Court to decide whether the Social Security Administration can take away social security disability benefits and Medicare needed for the necessities of life from an individual without first providing:

a) Notice which a reasonable person can understand and

b) An opportunity to present objections at a meaningful evidentiary hearing in accordance with basic due process standards.

2. Petitioner, Timothy Gibler, asks this Court to decide if a social security disability beneficiary may have access to the federal court system to adjudicate due process issues over which the Social Security Administration's Administrative Law Judges and Appeals Council have no jurisdiction.

3. Petitioner, Timothy Gibler, asks this Court to decide whether the Social Security Administration can retroactively, with no time limit, require beneficiaries, as a condition to continue to receive social security disability benefits and Medicare, to produce minute detail, such as the amount of money spent on anti-psychotic medication, taxi fare or leaving work early.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
UNITED STATES CODES	iv
FEDERAL REGULATIONS	v
INTRODUCTION	1
JURISDICTION	3
STATEMENT OF FACTS	3
A. Cessation of Benefits	3
B. District Court Disposition	6
C. Hearing before the Administrative Law Judge	10
EXHAUSTION	10
STATUTORY AND REGULATORY SCHEME	11
A. Disability Status and Work Activity	11
B. Exhaustion	13
REASONS FOR GRANTING THE PETITION	14
A. Continuing Due Process Violations	14
B. Right to Notice and an Opportunity to Appeal	14
C. Right to Fair and Accurate Evidence	16
ALL ADMINISTRATIVE REMEDIES WERE EXHAUSTED	17
THE NINTH CIRCUIT'S DECISION WAS NOT MADE ON THE MERITS	19
CONCLUSION	20
APPENDIX	A-i

TABLE OF AUTHORITIES

CASES

	Page
Bowen v. New York, 476 U.S. 467 (1986)	14, 16, 23
Corroa v. Shalala, 20 F. 3d 934 at 948. (9th Cir. 1994)	17
Dusenbery v. United States, 534 U. S. 161 (2002)	21
Friends of the Earth v. Laidlaw Environmental Services, 528 U. S. 167, 120 S. Ct. 693 (2000)	14
Goldberg v. Kelly, 397 U.S. 254 (1970)	23, 24
Gonzalez v. Sullivan, 914 F.2d 1197, 1203 (9th Cir. 1990)	21
Lewis v. Apfel, 236 F. 3d 533 (9th. Cir. 2001)	17
Matthews v. Eldridge, 424 U.S., at 328, 96 S.Ct., at 899	14
Matthews v. Eldridge, 424 U.S. 319, 342-343 (1976)	24
Schweicker v. Chilicky, 487 U. S. 415, 415-417 (1988)	24
Sweierkiewiez v. Sorema, 534 U.S. 506 (2002)	25
Udd v. Massanari, 245 F.3d 1096, 1099-1102 (9th Cir. 2001)	21
Udd v. Massanari, 245 F.2d 1096 (9th Cir. 2001)	22
Weinberger v. Salfi, 422 U.S. 795, 95 S. Ct. 2557, 2581 (1975)	16

UNITED STATES CODES

42 U.S.C. § 405(c)(3), (c)(4)(A)	15
42 U.S.C. § 416(i)	16
42 U.S.C. § 423(d)	16
42 U.S.C. § 423 (f)	18
42 U.S.C. § 423 (f), (g)	24
42 U.S.C. § 423 (g)	18, 25
42 U.S.C. § 1320 b-19, Pub. L. 106-170	17

TABLE OF AUTHORITIES

FEDERAL REGULATIONS

	Page
20 C.F.R. § 404.803	15, 22
20 C.F.R. § 404.909 (a) (1)	18
20 C.F.R. § 404.987, *et. seq.*	13
20 C.F.R. § 404.1505 *et. seq.*	16
20 C.F.R. § 404.1510	10
20 C.F.R. § 404.1572	10
20 C.F.R. § 404.1573(c), (1)-(6)	17
20 C.F.R. § 404.1574(2) Table 1	16
20 C.F.R. § 404.1574 (a) & (a)(2)	16
20 C.F.R. § 404.1574 (a)2	16
20 C.F.R. § 404.1589	18, 19
20 C.F.R. § 404.1595(a)	20
20 C.F.R. § 404.1595 (b)1	9, 24
20 C.F.R. § 404.1595(b)(2)	18, 20
20 C.F.R. § 404.1595 (c)	9
20 C.F.R. § 404.1596 (c)	18
20 C.F.R. § 404.1596(c)(1)	24
20 C.F.R. § 404.1597(a)	18
20 C.F.R. § 416.1112 (7) (2004)	17

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INTRODUCTION

Petitioner ("Gibler") seeks judicial review of the due process violations that he experienced when Respondent Social Security Administration ("SSA") summarily cut off his disability benefits. Although those benefits were ultimately restored (but at a lower monthly rate), it took two years for the internal Social Security processes to reverse the initial determination to end his benefits. The consequences were catastrophic for a mentally disabled individual who relies on his disability benefits which are essential for his survival.

The administrative mishandling of Gibler's claims file (which included evidence of his ongoing, critical medical condition, as well as evidence that SSA had previously determined that Gibler's "work"—as an occasional singer in

church choirs—was de minimus) was egregious. So egregious were its administrative omissions that due process considerations lead to the conclusion that disability beneficiaries should be protected by actual hearings *before* their benefits are cut off as SSA has only afforded this protection to disabilities if a review is denoted a "medical review" verses a "work review."

Any benefit of administrative ease by not affording notice and a hearing prior to termination of benefits cannot override basic notions of due process. This hesitancy by the courts below is understood to facilitate administrative processing; however, Gibler requests that this Court find his Fifth Amendment rights were—and continue to be—violated.

The issues raised here are by no means moot. SSA initiated yet another review of Gibler's earnings history (including re-review of years that had already been adjudicated by the Administrative Law Judge in this case) while two appeals were still pending before the Ninth Circuit, resulting in the United States Court of Appeals issuing an emergency stay.

Gibler was further denied his due process rights by Social Security regulations that mandate that great weight be given to stale evidence, that is, adverse action summarily taken on earnings records that are over ten years old. Even the Administrative Law Judge below, who followed those regulations, made clear that he was uncomfortable with their application in the instant case.

Due process violations run throughout this case; yet so far the courts have declined to address those concerns on the merits.

JURISDICTION

This Petition flows from a Denial of two Petitions For Rehearing En Banc before the United States Court of Appeals for the Ninth Circuit dated January 5, 2005 (Appendix Exhs. 2,7 pp. 2,7)

STATEMENT OF FACTS

A. *Cessation of Benefits*

Gibler was diagnosed as schizophrenic when he was in his twenties. Not long after, in 1979, he received Social Security disability benefits and has remained on them ever since. Periodic medical reviews performed by SSA in 1986, 1991 and 1996, have confirmed his ongoing disability. In 1987, Gibler was subjected to a "work review." His occasional work as a pick-up singer in church choirs was determined to be "sheltered work". (Opinion of Administrative Law Judge, dated August 30, 2001, Appendix Exh. 17, pp. 95-110)

In a continuing disability review report, dated and signed by Gibler on January 15, 2000, which is the subject of this appeal, Gibler informed SSA that he is afraid to leave his apartment, he has agoraphobia, he is trying to see a counselors, and "I could not remember where to go...I must quit. . . . " (ALJ Decision Exhibit List No. 28, Appendix Exh. 17, pp. 95-110). Similarly SSA typed an acknowledgment that it was informed that Gibler was psychotic and would be out on the street without benefits. (ALJ Decision, Exhibit List No. 34.) In early February 2000 during the pendency of the review, Gibler was placed in a psychiatric lock-up ward in a San Francisco hospital for approximately a week to ten days. (See hospital discharge summary dated February 18, 2000 from SSA file, Appendix Exh. 22, p.120)

On April 20, 2000 SSA, through one of its local San Francisco field offices, sent Gibler a letter and questionnaire requesting information about his work history since 1979.

According to Social Security records, the in-person and written communications were followed by a telephone call to Gibler, initiated by Social Security claims representative, Donald Worms. Gibler and SSA claims representative Worms went over Gibler's work history for the previous twenty years. For many years, the only work that Gibler had been able to undertake had been occasional singing in choirs.

Shortly thereafter, Gibler received a written communication, dated July 27, 2000 (Appendix Exh. 19 pp. 113-116), from SSA, requesting additional information for Gibler's earnings history for the years 1979 through 2000. This letter listed seven employers (all churches or musical associations), as well as a supposed period of "self-employment," from January 1988 to December 1991. The employers listed were the very ones that Gibler had named to claims representative Worms. There was no mention of a hospital discharge summary from February 2000 in the SSA file.

20 C.F.R. § 404.1595 (c) states ". . . If you agree with the advance notice, you do not need to take any action. . . ." This regulation also states at 404.1595 (b)1 that " Medical reasons. The advance notice will tell you what the medical information in your file shows. . . ." SSA ignored its own regulation by not telling Gibler that being in a lock-up psychiatric ward was a ground for not terminating benefits and that SSA was required to obtain an opinion from a [his] psychiatrist, a treating source, i*nfra* at page 20.

This letter dated July 27, 2000, from SSA contained little specific information. It did not set out the amount (or even range) of Gibler's purported earnings. The letter did not in any way intimate that the Social Security concepts of "sheltered work," "work subsidies," "impairment related work expenses", or "sporadic work" had been or could be

considered.[1] The letter discussed briefly SSA's "substantial gainful activity work" test (usually called "SGA") and told him of his so-called "trial work period," which Gibler was then first told ended in 1981.[2] The letter did suggest that Gibler might have mistakenly been receiving disability benefits since April 1988 (over twelve years previously), due to "substantial work as of January 1988." (Appendix, Exh. 19, pp. 113-116)

Gibler, with the assistance of counsel, sought testimony from his treating psychiatrist, Dr. Carol Banyas, who testified in the district court via declaration (Declaration of treating psychiatrist. Appendix, Exh. 20, pp.117-118). He also filed a new application for disability benefits; which was approved *based on the very same evidence used to terminate him.*

For almost all years of his earnings history, Gibler's wages fell below the monthly SGA[3] caps of $300 (that applied in 1980-1989), $500 (1990-1998) and $700 (1999-2000). In two years, 1988 and 1990, his wages were higher.

Without any further communications the SSA summarily ceased paying Gibler's benefits on November 1, 2000 with no appealable notice.[4]

Multiple attempts via telephone, fax and mail[5] to have Gibler's benefits reinstated through Mr. Larimore, senior attorney at SSA's Regional Commissioner's Office, Critical Congressional Unit were unavailing because the claims file

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[1] "Sporadic work" comes from substantial gainful activity 42 U.S.C. 423 (d) (1) and 20 C.F.R.404.1510 & 1572 and case law.

[2] 20 C.F.R. 404.1592(a)

[3] See 42 U.S.C. § 423(d)(1)(A); 423(d)(2)(A), and § 20 C.F.R. §§ 404.1510 and 404.1572 .

[4] The check he did not receive in November would have been for his October benefits.

[5] Numerous confirming letters are exhibits of record.

had already been closed and transferred to Baltimore, MD where it was lost for five to six months. Although SSA never[6] gave Gibler a formal notice initial cessation,[7] in order to put the appeal process on track, Gibler filed a "premature" Request for Reconsideration on or about November 2000. The Request for Reconsideration was denied by summary notice, issued by SSA's headquarters in Baltimore dated March 23, 2001.[8]

B. ***District Court Disposition***

As Gibler had been deprived of benefit checks and Medicare coverage for four months, on March 1, 2001, he petitioned the District Court for a Writ of Mandamus, seeking immediate re-instatement of benefits. Gibler also sought to have the district court order SSA to commence a new evaluation of Gibler's medical condition given the testimony of his former treating psychiatrist who stated there was substantial increased risk of decompensation. (District Court Case No. CV 01-0895 MJJ/JL, "Gibler I"). SSA brought a Motion to Dismiss for lack of subject matter jurisdiction (based on not fulfilling the exhaustion administrative remedies doctrine) which was denied, after hearing on June 12, 2001, by Order entered July 11, 2001. The District Court's basis for denying the motion to dismiss was a determination that Gibler had raised a colorable constitutional claim of a due process violation. (Order Denying Motion to Dismiss, Appendix Exh. 15, pp. 60-81.

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[6] Long after the Request for Reconsideration had been filed in this case, the SSA issued a "reconstructed" Notice of Cessation.

[7] This omission is conceded by the SSA. (SSA's Brief In Support of Cross Motion for Summary Judgment dated May 28, 2002 at page 11:1-3 and Brief of Appellee, Case No. 03-15836, page 5 and footnote 3.)

[8] Per District Court's October 16, 2002, Order, Appendix Exh. 13, pp. 22-42 reconsideration was denied on March 23, 2001. Normally, Requests for Reconsideration are handled in a local (San Francisco) office not in Baltimore, MD.

At the June 12, 2001 hearing and in its July 11, 2001 Order, the District Court indicated that its concern was a prompt resolution of Gibler's case by way of a hearing before an Administrative Law Judge. The District Court was apparently unwilling or unable to explore the full ramifications of a prompt hearing and decision by an Administrative Law Judge. The Court, moreover, suggested that mandamus would not lie because Gibler had failed to exhaust his administrative remedies. (Appendix Exh. 15, pp. 60-81, Order of July 11, 2001, page 4.)

In response, counsel for Gibler brought a second action for declaratory and injunctive relief (Gibler II, District Court Case No. C 01-2774 MJJ) and at or about the same time filed a Motion for Injunctive and Declaratory Relief in the first action (Gibler I). The court chose to deny the motion in the first case (Gibler I) and to dismiss the second case (Gibler II).

Gibler was not permitted to utilize discovery. A Motion to Compel Discovery was denied with respect to all depositions and other discovery, except for production of one document because a Magistrate Judge found the Court had already decided not to rule on how due process impacts social security procedures. (See Order of Magistrate Judge, Gibler I, dated July 2, 2002, with a clear restatement of the posture of the case and Order confirming stipulation of the parties. (Appendix Exh. 14, pp. 43-59)

The case commenced by Petition for Writ of Mandamus was thereafter left to languish until it was brought to conclusion by Gibler's Motion for Summary Judgment, filed February 14, 2002 and denied, after hearing on October 15, 2002, by Order dated October 16, 2002 (Appendix Exh. 13, pp. 22-42) At the same time, Respondent's Cross-Motion for Summary Judgment was granted.

The issues herein are not moot. At no time during this case did the District Court go further than addressing a "colorable

claim of due process," in so far as how promptly the hearing by the Administrative Law Judge could be scheduled.[9]

> "However, the Court expressly declined to reach the issue of whether SSA's scheme for review was unconstitutional as applied to Gibler." Order of January 11, 2002, at page 3.)

Similarly, at an earlier hearing in the same case, the District Court stated with respect to due process and social security procedure:

> ". . . I never took jurisdiction of the merits of the determination. So you could not get judgment for that."[10]

Ultimately, Gibler filed a third action for injunctive and declaratory relief on February 25, 2003. (District Court Case No. CV-03—0823 MJJ (Gibler III), one of the two subject cases of this appeal). By this time, every conceivable administrative avenue had been explored, even by moving to "reopen" within SSA's regulatory framework... The ALJ, on Gibler's request to reopen pursuant to 20 C.F.R. § 404. 987, *et. seq.* amended his decision after which time, SSA' appeals council denied review. The District Court complaint (Gibler III) was timely filed thereafter. (See Amendment to ALJ decision dated October 30, 2002, as to reopening (Appendix, pp. 111-112) Since the District Court had refused to address the major due process issues in the mandamus case (Gibler I) including precluding Gibler from taking any depositions, Gibler sought declaratory and injunctive relief to urge the district court to permit appropriate discovery and adjudicate the due process issues. (Gibler III)

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[9] October 16, 2002, Order, (Appendix Exh. 13, pp. 22-24

[10] Transcript, January 8, 2002 hearing, (Appendix Exh. 23, pp. 121-125).

The Gibler III complaint was dismissed for failure to state a cause of action even though SSA addressed the allegations on the merits. In its second Motion to Dismiss the complaint SSA stated: *Res judicata* bars all grounds for recovery which could have been asserted and the Court already adjudicated the due process issues and 2) SSA had given Gibler an opportunity to be heard. (Brief of SSA filed July 17, 2003, pages 4:8-12, 21-28). The Distr*ict* Court stated "To the extent "collateral estoppel",[*not res judicata*]. (Order of August 21, 2003).

In any event, the constitutional issues were never adjudicated.

Citing *Friends of the Earth v. Laidlaw Environmental Services*, 528 U. S. 167, 120 S. Ct. 693 (2000), Gibler believed he could be subjected to yet another work review although his benefits had been restored. Gibler, in fact, received another work review notice resulting in the Ninth Circuit issuing an unopposed Emergency Order dated April 28, 2004 for a stay. (Appendix Exh. 9, pp. 12-13.

A Rule 60(B) Motion for Relief from Judgment was denied by Order dated filed April 16, 2003 (Appendix Exh. 12 pp. 18-21) which preceded an appeal in the Ninth Circuit. (Gibler I). Gibler requested the Circuit Court take into account a merit reason for tolling for a late filing after a Judgment based on Motions for Summary Judgment, i.e., that Gibler was in a psychotic episode and temporarily would not (because of incapacitation) authorize the appeal. (See declaration of Gibler's attorney dated July 7, 2003, Appendix Exh. 10, pp. 14-16 and Order denying request to toll from a two judge "procedure only" panel). See *Bowen vs. New York*, 476 U.S. 467 (1986) and *Matthews v. Eldridge*, 424 U.S., at 328, 96 S.Ct., at 899 for tolling.

In each of the three cases detailed above, Gibler raised the due process concerns that his Petition for Writ of Certiorari addresses.

C. *Hearing before the Administrative Law Judge*

This has become the final decision of SSA. On August 27, 2001, a de novo[11] hearing was held before United States Administration Law Judge F. Neil Aschemeyer, who issued a mostly favorable Decision on August 30, 2001. (Appendix Exh. 17, pp. 95-110) For the first time since SSA began the work review process in January 2000, there was a hearing with an opportunity to present evidence in the form of testimony and an opportunity to make objections.

The Administrative Law Judge determined that Gibler had been disabled within the meaning of Title II of the Social Security Act and that he had not performed SGA since January 1, 1991.[12] Moreover, the Administrative Law Judge found that after Gibler's disability benefits were cut off, his "only income at this time is the still small amount of wages and food stamps, which are insufficient to cover his ordinary living expenses." (ALJ Opinion, *supra.*)

The Administrative Law Judge was obliged to accept Social Security's evidence of Gibler's earnings records. 42 U.S.C. § 405(c)(3), (c)(4)(A); 20 C.F.R. § 404.803. He expressed, however, serious reservations about the accuracy of those records for the years 1988, 1989 and 1990, years during which the SSA asserted that Gibler had been self-employed. (ALJ Opinion, *supra.*)

Four months after this decision was rendered, Gibler's benefits were ultimately restored, in part, by the Baltimore, MD payment center in December 2002.

EXHAUSTION

The ALJ and SSA's Appeals Council (administrative appeal) being bound by all SSA's regulations and internal

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[11] See 20 C.F.R. § 404.943.

[12] Appendix pp 95-110, Exhibit 1—ALJ Opinion, page 7.

rulings, have no jurisdiction to rule on constitutional issues. A filing under these circumstances would be futile and meaningless. See *Bowen vs. New York*, 476 U.S. 467 (1986); *Weinberger vs. Salfi*, 422 U.S. 795, 95 S. Ct. 2557, 2581 (1975).

After the ALJ reopened and amended his Decision, dated October 30, 2002, review of which was denied by the Appeals Council (Appendix Exh. 18, pp. 111-112.), the third due process complaint was filed in the District Court, Gibler III.

STATUTORY AND REGULATORY SCHEME

A. *Disability Status and Work Activity*

To determine whether an individual is disabled within the meaning of 42 U.S.C. §§ 416(i), 423(d) and 20 C.F.R. § 404.1505 *et seq.*, requires analysis of a host of complex factors. Aside from analyzing how medical diagnoses[13] impact an individual's ability to work, SSA must also consider an individual's work history.

The amounts of the SGA caps have increased slowly over the years. From 1980 to 1989, the cap was $300 per month. 20 C.F.R. § 404.1574(2) Table 1. From 1990 to June 1999, the cap was $500 of earnings per month. *Id*, etc. If an individual is being paid more than other similarly situated workers receive for it, such activity is considered "subsidized work." 20 C.F.R. § 404.1574 (a)2. Earnings from "subsidized" work do not "count" towards the SGA. 20 C.F.R. § 404.1574 (a) & (a)(2.)

An individual may "work" in a "sheltered workshop." 20 C.F.R. § 404.1573(c), (1)-(6). Work in a sheltered workshop does not count towards a calculation of SGA. Additionally,

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[13] Which SSA contends are not at issue in the present cases, but which Gibler asserts should have been addressed.

impairment related work expenses (IRWE's) are deductible from a presumptive monthly SGA dollar amount.

A parallel exception to those established by the regulations cited above is "sporadic work."

The reasons for initiating a particular work review are not publicly known. In practice, for any reason and at any time-even arbitrary and capricious reasons—the Agency may begin a work review.

As explained above, earnings of a certain level only raise a presumption of SGA. *Lewis vs. Apfel vs.* 236 F. 3d 533 (9th. Cir. 2001); *Corroa vs. Shalala*, 20 F. 3d 934 at 948. (9th Cir. 1994) Many factors must be considered before benefits may be cut off. In addition to the exceptions outlined above, there are multiple "return-to-work" schemes, which permit a recipient to experiment with returning to work before foregoing his benefit checks. Similarly, he may participate in the Ticket-to-work act and work incentive program 42 U.S.C. § 1320 b-19, Pub. L. 106-170, or under SSI rules a beneficiary may keep one dollar for every two dollars earned. 20 C.F.R. § 416.1112 (7) (2004)[14]

The congressional policy underlying these work schemes is that the disabled should be encouraged to go back to work and should in no way be discouraged from attempting to work for fear of jeopardizing their benefits. (Ticket To Work Act, *supra*).

Once the Agency has taken into consideration all of the above factors, if it then makes a determination that a disability benefits recipient is engaging in SGA, the Agency may terminate his benefits. But now the burden of proof has

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[14] Although this applies to SSI recipients it shows Congress' policy of work incentives. If Gibler had not worked during his life he would not have been ceased because of the "2 for 1" work incentive rule under the poverty program.

shifted. Pursuant to 42 U.S.C. § 423 (f) Disability insurance benefit payments, which also apply to medical reviews, the beneficiary is presumed to continue to qualify for disability status absent a showing of substantial evidence to the contrary. 42 U.S.C. § 423 (g) provides for continuation of benefits pending review simply by requesting it.

Moreover, before benefits can actually be cut off, the Agency must give the beneficiary proper notice. See 20 C.F.R. § 404.1589. Notice must contain certain information, i.e.

> ". . . The advance notice will tell you ... this work shows you are not disabled." 20 C.F. R. § 1595(b)(2). Also see 20 C.F.R. § 404.1597(a).

The regulations provide that benefits will not stop if:

> ". . . . We will not suspend your cash benefits if . . . (1) The evidence in your file does not clearly show that you are not disabled. . ." 20 C.F.R. § 404.1596 (c).

B. *Exhaustion*

After receiving an adverse determination, an individual must file a Request for Reconsideration, within 60 days. 20 C.F.R. § 404.909 (a) (1). Within 60 days of a denial of Reconsideration (in this case called a "Notice of Reconsideration,") a claimant may file a request for hearing before an administrative law judge. It generally takes between six months to two years before the hearing is held. (See District Court Order denying SSA's Motion to Dismiss dated July 11, 2001. (Appendix Exh. 15, pp. 60-81)

It often takes months (in the case here, four months) for the judge's decision to be implemented.

After an adverse (or only partially favorable) decision from the Administrative Law Judge, within sixty days, a claimant may seek review from the "Appeals Council," located in Falls Church, VA. In this case, as neither the Administrative Law

Judge nor the Appeals Council had jurisdiction over due process issues, further applications for relief from either one would have meaningless, there being no further administrative remedies to exhaust.

Moreover, Gibler agreed with the ALJ's decision[15] excepting only the part over which the ALJ had no jurisdiction, the detail relating to the years 1988-1990. This was appealed to the Appeals Council after the ALJ amended his decision. This due process complaint, dismissed with prejudice, is now before this Court (Gibler III). (Appendix Exh. 16, pp. 82-94).

REASONS FOR GRANTING THE PETITION

A. *Continuing Due Process Violations*

During the pendency of these appeals before the Court of Appeals for the Ninth Circuit, SSA commenced another work review. The period of time SSA proposed to consider in its new work review included, years in the 1990s that had been adjudicated by the Administrative Law Judge in the present two cases in August 2001. SSA did not even oppose Gibler's request for an emergency stay pending appeal.

B. *Right to Notice and an Opportunity to Appeal*

To cease benefits, the continuing disability review scheme calls for at least a two-step notice procedure: ". . . we will notify you in writing and give you an opportunity to appeal." 20 C.F.R. § 404.1589.

The July 27, 2000, letter from Social Security to Gibler (Appendix Exh. 19, pp. 113-116) clearly was in the nature of the first notice outlined in the regulation cited immediately above. "[W]e will notify you that we are reviewing your

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[15] 20 C.F.R. 404.900 (3) provides for administrative review for people who are "dissatisfied" with an ALJ decision.

eligibility for disability benefits and why we are reviewing your eligibility . . . ." *Id.*

The second notice, which should have set out the claims representative's decision and the reasons for it, was never sent. The second notice would have included information on Gibler's right to appeal. Instead, Gibler's benefits were summarily cut off on November 1, 2000, before he was ever given any opportunity to appeal. What the second notice should have shown was Social Security's analysis of Gibler's earnings history and how the analysis compelled a conclusion that he was engaging in SGA. The second notice should have detailed Gibler's opportunity to appeal from such an analysis, not simply an invitation to provide further information.

> ". . . We will tell you why we have determined that you are not now disabled, . . . and why this work shows you are not disabled. 20 C.F.R. §§ 404.1595(a); 404.1595(b)(2).

Gibler had no procedural opportunity to challenge the faulty nature of the Administration's analysis. The only avenue of relief remaining was the filing of a premature "appeal" (Request for Reconsideration) after Gibler's benefits were cut off. SSA claims representative Donald Worms had never applied the mitigating factors of sheltered work, work subsidies, impairment-related work expenses and sporadic work to Gibler's work history.

Yet, particularly in light of its own determination of "sheltered work" back in 1987, the SSA was under an obligation to perform such an analysis before termination. The doctrines of *res judicata* and administrative finality apply to social security decisions. Nothing has changed in Gibler's work or ability to work since the 1987 review. (See ALJ opinion (Appendix Exh. 17, pp. 95-110)

SSA makes much of Gibler's failure to reply to its July 27, 2000, letter. Yet, in his telephone conference with claims

representative Worms, Gibler had already complied and had no further basic facts to supply about his employers or earnings for the previous 20 years. In addition to obtaining the opinion of Carol Banyas, M.D., the former primary treating psychiatrist, Gibler filed a new application for disability. Without an initial decision from which to appeal, Gibler did all that could be expected. Notice was deficient See *Dusenbery v. United States*, 534 U. S. 161 (2002).

Before their benefits are cut off, Social Security recipients are entitled to proper notice. *Udd vs. Massanari*, 245 F.3d 1096, 1099-1102 (9th Cir. 2001); *Gonzalez vs. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990). In a case such as Gibler's, involving support for the necessities of life, such due process protections are particularly vital.

C. *Right to Fair and Accurate Evidence*

In the case below, the Administrative Law Judge considered Gibler's entire work history since 1979. The most troubling part for the ALJ to analyze was Gibler's earnings records for 1988 and 1990 because a reasonable person would not ordinarily be able to recall minute detail from ten to thirteen years ago. Yet the ALJ went so far as to reveal in his opinion that he had doubts about the accuracy of these records: ". . . The self employment income established by the claimant's earnings record appears (on the surface) to be an aberration. . ." (ALJ Opinion.)

The special considerations to which the Administrative Law Judge referred in the passage quoted above were considerations of "impairment-related work expenses,"[16] as sheltered work or sporadic work. Gibler's case would have been greatly bolstered, if he had been able to produce receipts

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[16] See the ALJ's comments on page 3 of his August 30, 2001 opinion: "[F]actor such as . . . whether the severity of the individual's impairment or impairments requires" (ALJ Opinion)

for expenses, such as special anti-psychotic medications needed or receipts from taxis taken after rehearsals. Those years were too long ago to reasonably require Gibler to recall.

The Administrative Law Judge noted:

> "Regulations at 20 C.F.R. § 404.803 state that after the statutory time limit (3 years, 3 months and 15 days after the end of a tax year), earnings records are conclusive. . . since it is impossible to determine whether special considerations existed in 1988 and 1990. . . ."

(ALJ Opinion.)

This statute of limitations is not reciprocal which means SSA can go back 10, 20, 30 or more years in a retroactive work review termination.

ALL ADMINISTRATIVE REMEDIES WERE EXHAUSTED

An ALJ and the Appeals Council have no jurisdiction outside of the social security act. Therefore, there was no realistic opportunity to make a factual record on constitutional issues beyond the ALJ decision.

SSA takes the position that Gibler failed to exhaust his administrative remedies. This Court has construed the due process clause to require a meaningful opportunity to be heard and present objections before benefits can be taken away or property alienated. Too often, decisions by low-level administrators, unfettered by considerations of fundamental fairness, are ill-conceived, as they are motivated primarily by such concerns as the number of cases processed each month. *Udd vs. Massanari*, 245 F.2d 1096 (9th Cir. 2001).

The facts of the present case demonstrate a wanton disregard of materials that were already contained in the SSA field office files. First, Gibler had already undergone a work review in 1987, wherein SSA had reached the conclusion that Gibler's sporadic singing in church (and occasionally, other) choirs was in the nature of "sheltered work." When, in 2000,

district office claims representative, Donald Worms, discussed Gibler's work history with him, Gibler informed Mr. Worms that he continued to earn a very limited income in the same way, and that he was very excitable and nervous. (Appendix Exh. 21 p. 119)

No sooner did the work review process get underway then Gibler was placed in a hospital psychiatric lock-up ward for a period of at least one week.[17] Gibler's hospital discharge papers were submitted to the local SSA office before SSA acted to cut off his benefits. The question of continuing disability should always be raised whenever a social security disability recipient is in a psychiatric lock-up ward.[18]

Several times including at a hearing on January 8, 2002 SSA represented that ". . . This cessation was not based on a continuing disability review, it was based on earnings over several years."[19]

Yet, the basis for discontinuing Gibler's benefits was that he was working or able to work. SSA's national policy is to ignore medical evidence and it has denied it had to consider medical evidence throughout this litigation contrary to 20 C.F.R. § 404. 1595 (b)1 and 404.1596(c)(1).

Goldberg v. Kelly, 397 U.S. 254 (1970) is the seminal case calling for hearings prior to termination of benefits. This case falls within the parameters of *Goldberg* for terminating benefits prior to a hearing as opposed to after and *Bowen, supra* for egregious conduct in disregarding the fact that Gibler was in a lock-up psychiatric ward during the work review.

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[17] The record shows that Gibler entered the hospital of California Pacific Medical Center, in San Francisco, discharged on February 18, 2000. (Appendix Exh. 22, p. 120)

[18] "Work," as in engage in SGA, not as in singing for a choir every once in a while.

[19] See Transcript January 8, 2002 (Appendix Exh. 23, pp. 121-125)

Matthew vs. Eldridge, 424 U. S. 319, 342-343 (1976) purported to distinguish disability beneficiaries from welfare recipients and held that claimants of "**modest means and outside resources**" (emphasis added) need not be protected by the stringent standards of a *Goldberg vs. Kelly* hearing. *Id.* Further in support of its holding in *Matthews*, this Court adduced evidence of procedural safeguards in the multi-layered review process including the use of medical professionals.

Congress over-ruled this holding of *Matthews vs. Eldridge*, *supra*. In the Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. § 423 (f), (g), Congress enacted a provision requiring continuation of benefits pending a "face to face" (hearing officer/judicial) hearing. In *Schweicker vs. Chilicky*, 487 U. S. 415, 415-417 (1988), egregious abuses were noted, e.g. ceasing social security beneficiaries on the very same evidence used to initially determine that they were disabled. Gibler was found disabled based on his new 2001 application for benefits filed in January 2001 *based on the very same evidence used to terminate him.*

Here a medical review was required so as not to violate procedural due process. A long line of cases commonly known as the "treating source rule" whereby a treating doctor's opinion may not be rejected absent clear and convincing evidence to the contrary.[20] A due process violation occurred here when treating psychiatrists' opinions were disregarded.

THE NINTH CIRCUIT'S DECISION WAS NOT MADE ON THE MERITS

Both the Court of Appeals for the Ninth Circuit and the District Court failed to adjudicate the due process issues squarely raised in the cases below. Yet Gibler is entitled to his day in court.

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[20] *Moore vs. Commissioner*, 278 F.3d 920 (9th Cir. 2002); *Lester v. Chater*, 81 F. 3d 821, 835 (9th Cir. 1995)

In *Sweierkiewiez v. Sorema*, 534 U.S. 506 (2002), this Court stated "we will not impose heightened pleading standards where Congress has not instructed us to do so . . ." Gibler has both a Fifth Amendment right to access to the courts because SSA is violating the 1984 amendments, *supra* in that benefits are required pending appeal so as not to violate due process.

The courts are needed to determine the fairness of Social Security administrative hearings when, as in the cases here, the evidentiary rules dictated by SSA regulations offend all notions of due process by the treatment of stale evidence (ten to thirteen years old, since 1987) as presumptively correct.

CONCLUSION

Gibler is asking this Court to find that necessities of life cannot be taken away before notice and a meaningful opportunity to be heard consistent with Congress's amendments giving recipients benefits pending appeal—42. U.S.C. § 423 (g) and the Due Process Clause.

Apparently, the District Court was reluctant to find exhaustion and decide the due process issues on the merits because of administrative ease. Although no depositions were permitted, since SSA concedes it properly followed its national procedure, Gibler submits there are hundreds of thousands of similarly situated people.

Respectfully submitted,

STEVEN BRUCE, *
PEOPLE WITH DISABILITIES
FOUNDATION
507 Polk Street, Second Floor
San Francisco, California 94102
(415) 931-3070

* Counsel of Record

Attorney for Petitioner

APPENDIX

TABLE OF CONTENTS [1]

FOR THE APPENDIX — Page

Exh.1. Judgment Filed January 14, 2005 in the Court of Appeals for the Ninth Circuit in Case 03-16901 entitled "*Timothy Gibler vs. Jo Anne B. Barnhart*, Commissioner of the Social Security Administration" (District Court Case No. 03-00823-MJJ)..... 1

Exh.2. Order Filed on January 5, 2005, in the Court of Appeals for the Ninth Circuit in Case 03-16901 entitled " *Timothy Gibler vs. Jo Anne B. Barnhart*, Commissioner of the Social Security Administration" (District Court Case No. 03-00823-MJJ)..... 2

Exh.3. Memorandum Filed and Entered October 8, 2004, in the Court of Appeals for the Ninth Circuit in Case 03-16901 entitled "*Timothy Gibler vs. Jo Anne B. Barnhart Commissioner of the Social Security Administration*" (District Court Case No. 03-00823-MJJ)..... 3

Exh.4. Judgment Filed January 18, 2005 in the United States Court of Appeals for the Ninth Circuit in Case 03-15836 entitled "Timothy Gibler vs. William A. Halter, Acting Commissioner of the Social Security Administration" (District Court Case No. 01-00895MJJ/JL)..... 6

---

[1] With regard to documents in the Appendix, counsel has reviewed scanned reproductions of original documents and certifies that to a substantial extent, they are true and correct replicas of the original documents

TABLE OF CONTENTS—Continued

Page

Exh. 5. Order Filed January 5, 2005 in the United States Court of Appeals for the Ninth Circuit in Case 03-15836 entitled "*Timothy Gibler vs. Jo Anne B. Barnhart*, Commissioner of Social Security Administration" (District Court Case No. 01-00895MJJ/JL) 7

Exh. 6. Memorandum Filed and Entered October 7, 2004 in the United States Court of Appeals for the Ninth Circuit in Case 03-15836 entitled "*Timothy Gibler vs. Jo Anne B. Barnhart*, Commissioner of the Social Security Administration" (District Court Case No. 01-00895MJJ/JL) 8

Exh. 7. Order filed September 9, 2004, in the United States Court of Appeals for the Ninth Circuit in Case 03-15836 Submitting Case Without Oral Argument. (District Court Case No. 01-00895MJJ/JL) 10

Exh. 8. Order filed September 9, 2004, in the United States Court of Appeals for the Ninth Circuit in Case 03-16901 Submitting Case Without Oral Argument. (District Court Case No. 03-00823-MJJ) 11

Exh. 9. Emergency Order for Stay Issued in the United States Court of Appeals for the Ninth Circuit in Cases 03-15836 and 03-16901. Filed April 28, 2004 (District Court Case No. 01-00895MJJ/JL) 12

TABLE OF CONTENTS—Continued

Page

Exh. 10. Declaration of Steven Bruce in Support of Opposition to Motion to Dismiss Filed July 7, 2003 in the United States Court of Appeals for the Ninth Circuit in Case 03-15836 entitled "*Timothy Gibler vs. Jo Anne Barnhart*, Commissioner of the Social Security Administration" ((District Court Case No. 01-00895MJJ/JL)) 14

Exh. 11. Order Dismissing Plaintiff's Second Amended Complaint with Prejudice Filed September 22, 2003 in the United States District Court for the Northern District of California Case 03-00823-MJJ entitled "*Timothy Gibler vs. Jo Anne Barnhart*" 17

Exh. 12. Order Denying Plaintiff's Motion for Relief from Judgment in United States District Court Case entitled "*Timothy Gibler vs. Jo Anne B. Barnhart*" Dated April 16, 2003. (District Court Case No. 01-00895MJJ /JL)..... 18

Exh. 13. Order Filed October 16, 2002 Denying Plaintiff's Motion for Summary Judgment and Granting Motion for Summary Judgment in the in the United States District Court for the Northern District of California Case C 01-0895 entitled "*Timothy Gibler vs. Jo Anne Barnhart*" (District Court Case No. 01-00895MJJ/JL) 22

TABLE OF CONTENTS—Continued

Page

Exh. 14. Discovery Order Filed July 3, 2002 in the United States District Court for the Northern District of California Case C 01-0895 entitled "*Timothy Gibler vs. Jo Anne B. Barnhart*, Commissioner of the Social Security Administration." And Order Confirming Stipulation Regarding Discovery Order Filed August 5, 2002 (District Court Case No. 01-00895MJJ/JL) 43

Exh. 15. Order Denying Respondent's Motion To Dismiss filed July 11, 2001 in the United States District Court for the Northern District of California Case C 01-0895 entitled "*Timothy Gibler vs. Larry G. Massanari*, Acting Commissioner of the Social Security Administration." 60

Exh. 16. Second Amended Complaint for Injunctive Relief, Declaratory Relief, Social Security Benefits and Sanctions; Jury Demand [Per Court Order] Filed August 28, 2003 in the 2003 in the United States District Court for the Northern District of California in Case C 03-0823 MJJ entitled "*Timothy Gibler vs. Jo Anne B. Barnhart.*" 82

Exh. 17. Decision of U.S. Administrative Law Judge F. Neil Aschemeyer, Dated August 30, 2001, in the Claim of Timothy Gibler for Period of Disability and Disability Insurance Payments, Social Security Administration's Office of Hearings and Appeals 95

TABLE OF CONTENTS—Continued

Page

Exh. 18. October 30, 2002 Amendment To Decision by U.S. ALJ, F. Neil Aschemeyer to Reopen and Revise the Hearing Decision Dated August 30, 2001. 111

Exh. 19. Social Security Administration Request for Additional Earnings Information Dated July 27, 2000 Issued by Field Office Manager John Hanley 113

Exh. 20. Declaration of Carol Banyas, M.D., Former Treating Psychiatrist, filed in United States District Court for the Northern District of California Case CV 01-0895 MJJ/JL entitled "*Timothy Gibler vs. Larry G. Massanari*, Acting Commissioner of the Social Security Administration." 117

Exh. 21. Report of Contact dated July 26, 200 by SSA Claims Representative Donald Worms 119

Exh. 22. Patient Discharge Instruction Sheet Dated February 18, 2000 120

Exh. 23. Transcript of Hearing January 8, 2002 on Plaintiff's Motion for Relief from Judgment and for Bad Faith EAJA Attorney Fees in the in the United States District Court for the Northern District of California Case C-0-0895 entitled "*Timothy Gibler vs. Jo Anne Barnhart*" Cover page and pages 4, 5, 12 and 13.... 121

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jan 14, 2005]

No. 03-16901
D.C. No. CV-03-00823-MJJ

TIMOTHY GIBLER,
Plaintiff-Appellant,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security Administration,
Defendant-Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California (San Francisco).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the, said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered Friday, October 8, 2004.

A TRUE COPY
Cathy A. Catterson
Clerk of Court
ATTEST
JAN 13 2005

by: illegible signature

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jan. 5, 2005]

No. 03-16901
D.C. No. CV-03-00823-MJJ

TIMOTHY GIBLER,
Plaintiff-Appellant,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security Administration,
Defendant-Appellee.

ORDER

Before: CUDAHY,* GRABER, and FISHER, *Circuit Judges.*

Judges Graber and Fisher have voted to deny the petition for rehearing en banc and Judge Cudahy has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing en banc is DENIED.

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* The Honorable Richard D. Cudahy, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

EXHIBIT 3

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Oct. 8, 2004]

No. 03-16901
D.C. No. CV-0300823-MJJ

TIMOTHY GIBLER,
Plaintiff-Appellant,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security Administration,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Submitted October 5, 2004*
San Francisco, California

MEMORANDUM**

Before: CUDAHY,*** GRABER, and FISHER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** The Honorable Richard D. Cudahy, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

Plaintiff Timothy Gibler appeals from the district court's order dismissing, with prejudice, his second amended complaint against the Social Security Administration. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

We review de novo the dismissal of a complaint for lack of subject matter jurisdiction, including dismissal for failure to exhaust administrative remedies. *Kildare v. Saenz*, 325 F.3d 1078, 1082 (9th Cir. 2003). We also have de novo review over dismissals for failure to state a claim, *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 619 (9th Cir. 2004), and decisions regarding issue preclusion, *San Remo Hotel, L.P. v. San Francisco*, 364 F.3d 1088, 1094 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3162 (U.S. Sept. 7, 2004) (No. 04-340).

After carefully reviewing the claims in Plaintiffs successive complaints, we conclude that the Second Amended Complaint properly was dismissed with prejudice. Several of Plaintiffs claims were not exhausted and do not warrant waiver of the exhaustion requirement. *See Johnson v. Shalala*, 2 F.3d 918, 921 (9th Cir. 1993) (describing the exhaustion requirement and judicial standards for waiving the exhaustion requirement). Several of Plaintiff's claims were litigated previously, in *Gibler v. Barnhart*, No. 03-15836, and therefore are precluded. *See Littlejohn v. United States*, 321 F.3d 915, 923 (9th Cir.) (describing the requirements for issue preclusion), *cert. denied*, 124 S. Ct. 486 (2003). Plaintiff's remaining claims fail to state a "colorable constitutional claim of due process violation that implicate[s] a due process right [either] to a meaningful opportunity to be heard or to seek reconsideration of an adverse benefits determination." *Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997) (alteration in original) (citation and internal quotation marks omitted) (describing an exception to the exhaustion requirement for colorable due process claims).

Moreover, we hold that the district court did not abuse its discretion when it dismissed Plaintiff's Second Amended Complaint with prejudice, after giving Plaintiff two prior opportunities to focus and clarify his complaint. *Cf. McHenry v. Renne*, 84 F.3d 1172, 1180 (9th Cir. 1996) (holding that the district court did not abuse its discretion by dismissing the plaintiff's third amended complaint with prejudice for failure to abide by Rule 8, which requires that each averment of a pleading be "simple, concise, and direct").

AFFIRMED.

A TRUE COPY
Cathy A. Catterson
Clerk of Court
ATTEST
JAN 13 2005

by: illegible signature
Deputy Clerk

EXHIBIT 4

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jan. 18, 2005]

No. 03-15836
D.C. No. CV-01-00895MJJ/JL

TIMOTHY GIBLER,
Plaintiff-Appellant,

v.

WILLIAM A. HALTER,
Acting Commissioner of the Social Security Administration,
Defendant-Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California (San Francisco).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered Thursday, October 07, 2004.

A TRUE COPY
Cathy A. Catterson
Clerk of Court
ATTEST
JAN 13 2005

by: illegible signature

EXHIBIT 5

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jan 05, 2005]

No. 03-15836
D.C. No. CV-01-00895-MJJ/JL

TIMOTHY GIBLER,
Plaintiff-Appellant,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security Administration,
Defendant-Appellee.

ORDER

Before: CUDAHY,* GRABER, and FISHER, *Circuit Judges.*

Judges Graber and Fisher have voted to deny the petition for rehearing en banc and Judge Cudahy has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing en banc is DENIED.

---

* The Honorable Richard D. Cudahy, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

EXHIBIT 6

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Oct. 7, 2004]

No. 03-15836
D.C. No. CV-01-00895-MJJ/JL

TIMOTHY GIBLER,
Plaintiff-Appellant,

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Submitted October 5, 2004*
San Francisco, California

MEMORANDUM**

Before: CUDAHY,*** GRABER, and FISHER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** The Honorable Richard D. Cudahy, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

Plaintiff Timothy Gibler appeals from the district court's order denying his motion for relief from judgment under Federal Rule of Civil Procedure 6003). We review only the grounds raised in the motion and cannot review the merits of the underlying judgment, *Cel-A-Pak v. Cal. Agric. Labor Relations Bd.*, 680 F.2d 664, 668 (9th Cir. 1982) (per curiam), and the standard is abuse of discretion, *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223 (9th Cir. 2000).

Plaintiff sought relief from the judgment on the basis of two legal arguments. "Legal error does not by itself warrant the application of Rule 60(b)," however. *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982). Even assuming that Plaintiff's Legal arguments had merit, the district court did not abuse its discretion in concluding that he had failed to demonstrate to that court "extraordinary circumstances which prevented" him from filing an appeal. *Id.*

Plaintiff also argues that we should reconsider a prior panel's ruling that he is not entitled to equitable tolling of the period for appeal of the underlying judgment. The period for filing a notice of appeal is subject to tolling only as provided in Federal Rule of Appellate Procedure 4, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315, 317 (1988), the conditions of which Plaintiff did not meet.

AFFIRMED.

A TRUE COPY
Cathy A. Catterson
Clerk of Court
ATTEST
JAN 13 2005

by: illegible signature
Deputy Clerk

EXHIBIT 7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Sep. 9, 2004]

No. 03-15836
D.C. No. CV-01-00895-MJJ/JL

TIMOTHY GIBLER,
Plaintiff-Appellant,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security Administration,
Defendant-Appellee.

ORDER

This case shall be submitted on the briefs and record, without oral argument, on October 5, 2004, in San Francisco, California, pursuant to Fed. R. App. P. 34(a)(2).

FOR THE COURT

CATHY A. CATTERSON
CLERK OF COURT

By: /s/ [Illegible]
Deputy Clerk

EXHIBIT 8

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Sep. 9, 2004]

No. 03-16901
D.C. No. CV-03-00823-MJJ

TIMOTHY GIBLER,
Plaintiff-Appellant,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security Administration,
Defendant-Appellee.

ORDER

This case shall be submitted on the briefs and record, without oral argument, on October 5, 2004, in San Francisco, California, pursuant to Fed. R. App. P. 34(a)(2).

FOR THE COURT

CATHY A. CATTERSON
CLERK OF COURT

By: /s/ [Illegible]
Deputy Clerk

EXHIBIT 9

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 28, 2004]

Nos. 03-15836, 03-16901
DC# CVO 1 -895-MJJ
Northern District of California
(San Francisco)

TIMOTHY GIBLER,
Plaintiff-Appellant,

v.

WILLIAM A. HALTER, Acting Commissioner of the Social Security Administration,
Defendant-Appellee.

ORDER

Before: O'SCANNLAN and BEA, *Circuit Judges*

Appellant's emergency motion for an order staying further administrative proceedings pending review of these related appeals is granted, pursuant to the agreement of the parties, as follows only:

1. Appellant is not required to respond to the March 2004 inquiry for information;
2. The Social Security Administration will not take any action concerning appellant's benefit record;
3. The Social Security Administration will not send any correspondence to appellant; and

4. If appellant inadvertently receives a systems generated letter from the Social Security Administration while these appeals are pending, he shall not be required to provide any response.

Appellant's request that this stay continue beyond disposition of these appeals through any remanded proceedings is denied without prejudice to seeking such relief, if appropriate, from the agency.

These related appeals are ready for calendaring.

EXHIBIT 10

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed July 07, 2003]

CIVIL ACTION NO. C 03-15836

STEVEN BRUCE, ESQ. CBN 70300
People With Disabilities Foundation
507 Polk Street, Mezzanine
San Francisco, CA 94102
Tel (415) 931-3070
(415) 931-2828

Attorneys for Appellant

TIMOTHY GIBLER

Appellant,

vs.

JO ANNE B. BARNHART, COMMISSIONER OF
THE SOCIAL SECURITY ADMINISTRATION

Appellee.

DECLARATION OF STEVEN BRUCE IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS

I, Steven Bruce am the attorney for Appellant and am duly licensed to practice before this Court and hereby declare as follows:

1. That on or about the time of Judgement in District Court this case, October 17, 2002, my client was undergoing severe exacerbation of his disability (psychotic and schizophrenia). He was in contact

periodically with the office and went back to the mid-west.

2. Around that point in time, October, November, and December, 2002, Mr. Gibler had tried to commit suicide on at least two occasions and was having severe problems with agitation, including panic attacks and suicide attempts.

3. It was and is my opinion as his attorney that I did not have clear authority to file the appeal at that time but did have authority to file a Motion for Relief from Judgment in which I clearly stated the Motion was timely filed due to my client's disability (mental condition).

4. The United States attorney and Office of General Counsel of Appellee fled no response to my Motion for Relief from Judgment within the time permitted.

5. I called Claire Mueller, the paralegal in charge of Social Security cases at the U.S. Attorney's office in San Francisco to ask why there was no opposition. I was informed that it was overlooked and that appellee asked for a stipulation for more time to fide a response. I signed the stipulation after which time the Hon. Martin J. Jenkins signed the stipulation to extend time.

6. The Motion was under submission for a long while after which time a timely Notice of Appeal was filed. I was convinced at that time that I had Mr. Giblet's clear authority to file the appeal herein.

I, Steven Bruce declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge; and that this Declaration was executed on July 7, 2003 at San Francisco.

/s/ Steven Bruce
STEVEN BRUCE

CERTIFICATE OF SERVICE

I certify that I served Appellant's Declaration of Steven Bruce in Support of Opposition to Motion to Dismiss by mailing two copies of the document to their attorney on this date addressed as follows:

GERALYN A. GULSETH, ESQ.
Social Security Administration
333 Market Street, Suite 1500
San Francisco, CA 94102

Executed on July 7, 2003 in San Francisco, California.

/s/ Carolyn Pruitt
CAROLYN PRUITT

EXHIBIT 11

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed Sep. 22, 2003]

No. C 03-0823 MJJ

TIMOTHY GIBLER,

Plaintiff,

v.

JO ANNE B. BARNHART,

Defendant.

ORDER DISMISSING PLAINTIFF'S SECOND AMENDED COMPLAINT WITH PREJUDICE

Pursuant to the Court's August 21, 2003 Order, Plaintiff's Second Amended Complaint is DISMISSED with prejudice; in addition, the Court declines to consider Plaintiff's "corrected" Second Amended Complaint, which was submitted without leave of Court.

IT IS SO ORDERED

Dated: September 22, 2003

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

EXHIBIT 12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DSTRICIT OF CALIFORNIA

[Filed April 16, 2003]

No. C01-0895 MJJ

TIMOTHY GIBLER,

Plaintiff,

v.

JO ANNE B. BARNHART,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

INTRODUCTION

On October 16, 2002, the Court denied Plaintiff's motion for summary judgment and granted summary judgment in favor of Defendant ("October Order"). Now before the Court is Plaintiffs motion for relief from judgment pursuant to sections (b)(2), (b)(4) and (b)(6) of Federal Rule of Civil Procedure 60. *See* Motion at 1:24. However, the only applicable provision under these circumstances is 60(b)(6), which provides for relief from judgement for "any . . . reason justifying" such relief.[1] This motion requires the Court to de-

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[1] Section (b)(2) provides relief from judgment where "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." *See also Riviera v. M/T Fossarina*, 840 F.2d 152 (9th Cir. 1988) ("'newly discovered evidence'

termine whether Plaintiffs bases for relief from judgement constitute "extraordinary circumstances." *Lafarge*, 791 F.2d at 1338. having considered the briefing in this matter, the Court DENIES Plaintiff's motion.

ANALYSIS

A. *Matthews v. Eldridge*

In denying (Plaintiff's procedural due process claim, the Court relied on the three-Dart balancing test outlined by the Supreme Court in *Matthews v. Eldridge*, 424 U.S. 319 (1976).[2] *See* October Order at 8:5-14:25. Plaintiff contends that *Matthews* has been overruled by the Supreme Court's more recent decision in *Dusenbery v. United States*, 534 I.J.S. 161 (2002). *See* Motion at 2:5-16. The Court disagrees.

In *Dusenbery*, Supreme Court declined to apply the *Matthews* balancing test to determine "the adequacy of the means employed by the Federal Bureau of Investigation ("FBI") to provide notice to a federal prisoner of his right to contest the administrative forfeiture of property seized (luring the execution of a search warrant for the residence where he was ar-

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normally refers to evidence of facts in existence at the time of trial of which the aggrieved party was excusably ignorant'). Here, Plaintiff offers no newly discovered evidence. Section (b)(4) provides for relief from judgment where "the judgment is void." Plaintiff offers no explanation as to why the Court's judgment would be void. Moreover, Plaintiff cannot plead under (b)(2) and (b)(4) if he chooses to plead under (b)(6). *See Lafarge Conseils Et Utudes, S.A. v. Kaiser Cement Gypsum Corp.*,79 1 F.2d 1334,1338 (9th Cir. 1986) ("[a] motion brought under (O(b)(6) must be based on grounds other than those listed in the preceding clauses").

[2] In *Matthews* Court balanced the following factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedure requirement would entail. *Id.* at 334-35.

rested." *Id.* at 163.[3] The Court held that although *Matthews* had been used to evaluate due process claims in a variety of contexts, the decision was not (meant to establish an "all-embracing test for deciding due process claims." *Id.* at 168. However, the *Dusenbery* Court never questioned the appropriateness of applying *Matthews* in the Social Security context, which is the very context in which the case itself arose. *See id.* at 167-68. Therefore, Plaintiff's motion fur relief from Judgment on this ground is denied.

B. *Schweiker v. Chilicky*

The Court also relied on the Supreme Court's decision in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), which held that a *Bivens* remedy (money damages against government officials) was unavailable, as a matter of law, based on alleged due process violations in the denial of social security benefits because "Congress . . . has address the problems created by state agencies' wrongful termination of disability benefits." *Id.* at 429; *see* also October Order 13:7-14:1. Plaintiff contends that he "does not fall within the class of [p]laintiffs address by the Supreme Court in . . . *Schweiker* . . . ." Motion at 5:3-4. Specifically, he argues that, unlike the plaintiffs in *Schweiker*, he was denied benefits based on "work review," not a "continuing disability review." Motion at 4:21-5:3. However, this factual distinction does not affect the applicability of the holding in *Schweiker* to the matter currently before the Court. Therefore, Plaintiffs motion for relief from judgment on this ground is denied as well.

CONCLUSION

Based on the above analysis the Court DENIES Plaintiff's motion for relief from judgment.

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[3] Rather, the Court applied a test of reasonableness under all the circumstances. *See Dusenbery*, 534 U.S. at 167-71 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

IT IS SO ORDERED.

Dated: April 16, 2003

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

EXHIBIT 13

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed October 16, 2002]

No. C 01-0895 MJJ

TIMOTHY GIBLER,

Petitioner,

JO ANNE B. BARNHART,
acting Commissioner of the Social Security Administration,
Respondent.

ORDER DENYING PLAINTIFF'S MOTION AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Before this Court is a motion and cross motion for summary judgment pursuant to Rule 56 of the Federal-Rules of Civil Procedure. In connection with his motion, Plaintiff Timothy Gibler ("Plaintiff') seeks a variety of relief, includeing a request for attorney's fees and costs pursuant to the Equal Access for Justice Act, 28 U.S.C. § 2412. ("EAJA"). The motions require" the Court to determine whether Plaintiff is entitled to judgment as a matter of law on his claim the Social Security Administration ("SSA" or "Defendant") violated his due process rights in terminating his disability benefits on the basis that his work singing in a church choir was substantial gainful activity ("SGA") which rendered him ineligible for benefits, and-then failing to immediately provide a hearing with an Administrative Law Judge ("ALJ") to

review the termination. Having read and considered the papers,[1] and having heard the parties at oral argument, the Court DENIES Plaintiff's motion for summary judgment and GRANTS Defendant's dross motion.[2]

FACTUAL BACKGROUND

Plaintiff received social security benefits under Title II of the Social Security Act ("Title II") from on or about 1979 because of a severe psychiatric disorder. Plaintiff underwent several continuing disability reviews since he became entitled to benefits. Each review resulted in a finding there had been no improvement in his psychiatric condition.

On July 26, 2000, Defendant provided Plaintiff with a Notice of Proposed Decision, informing him his reported work could affect his benefits and that he had ten (10) days in which to provide more information before a final decision and notice of termination. *See* Declaration of Donald Worms ("Worms Decl.") at ¶ 3, E h. 2. Defendant issued this notice on the basis of Plaintiffs claim of sporadic employment as .a signer in a church choir since 1979. The notice explained he had used up his practice work periods by 1988, his records

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[1] Together with his motion, Plaintiff-requests the Court take judicial notice of two things: 1). there are many Social Security beneficiaries who are on both the program under Title JI of the Social Security Act ("Title II"), which has no income and resources eligibility requirements, and the program under Title of the Social Security Act program which does have income and resource eligibility requirements; (2) the Administrative Law Judge ("ALJ") does not have authority or jurisdiction to adjudicate constitutional claims. The Court DENIES Plaintiff's request as these are facts which are not of the type judicially noticed. *See* Fed. R. Evid. 201(b) (defining judicial noticed facts as those "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

[2] Because the Court DENIES Plaintiff's motion, the request for relief, including attorney's fees and costs under the EAJA, is also DENIED.

reflecting earnings of $11,319 for 1988, $3,790 for 1989 and $13,210 in 1990. *See* Declaration of Cheryl Jacobson ("Jacobson Decl.") at ¶ 4. Defendant did not take Plaintiff s medical record into account in making its termination decision, terminating benefits instead on grounds he completed of a 9-month trial work period, as opposed to a change in medical condition.

The ten (10) days expired without any new submissions from either Plaintiff or his attorney, although his attorney had visited the SSA district office in San Francisco sometime in August 2000 to review and copy the file. *See* Worms Decl. at ¶ 5. Records indicate, social security payments for Plaintiff stopped in October 2000. *See* Jacobson Decl, at 1 8. No final notice had been issued, bit, at that time, his attorney filed a request for reconsideration. In addition, Plaintiff, through his attorney, contacted staff in multiple departments of the SSA, requesting he remain on check status and have a medical examination to evaluate his continuing disability. Neither, however, was forthcoming.

On February 13, 2001, Plaintiff received the Notice of Termination informing him he no longer qualified for social security benefits because he had been engaging in SGA as of January, 1988, and his entitlement to benefits had therefore ended as of March 1988. This letter also informed Plaintiff of his right to appeal the decision within sixty days and/or file a new application.

On March 1, 2001, Plaintiff fled this instant action seeking review of the termination of benefits, and immediate reinstatement of benefits. *See* Complaint at 11:19-22; *see also* August Order at 1:22-24 (describing motion as seeking immediate reinstatement of benefits). At or about the same time, Plaintiff filed a motion for reconsideration of the termi-

nation with the SSA, which it denied on March 23, 2001.[3] Plaintiff then requested a hearing with an ALJ to appeal the decision.

In the interim, Defendant moved to dismiss the instant action for lack of subject matter jurisdiction, arguing Plaintiff had failed to exhaust all administrative remedies as required by the Social Security Act and did not raise a colorable constitutional due process claim. After hearing the parties and considering the papers, the Court found Plaintiff had not exhausted his administrative remedies and, on that basis, the Court rejected almost all of his constitutional claims. It denied the motion, however, upon finding that Plaintiff raised at least a colorable constitutional claim the procedures in place for challenging an adverse SSA determination through an ALJ hearing, as applied to him, violated his due process rights, *See* July 11, 2001 Order Denying Motion to Dismiss ("July Order") at 16-22-17:3. This finding was based on the length of time it took to obtain an ALJ hearing after an adverse SSA determination and evidence Plaintiff may mentally decompensate before he was granted a hearing, which could make such a hearing so unreasonably delayed as to violate due process. *See id.* at 12:16-17:3. However, the Court expressly declined to reach the issue of whether the SSA's scheme for review was actually unconstitutional as applied to Plaintiff. *See id.* at 16:20-22.

After the July Order issued, the A notified Plaintiff his appeal of the termination would be heard on August 27, 2001. At or about the same time, Plaintiff moved for declaratory and preliminary injunctive relief in the instant action, requesting the Court order the SSA to reinstate him to Medicare and all other Title II benefits within ten days, and award him costs and attorney's fees. The Court denied the

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[3] During the reconsideration, Defendants transferred Plaintiff's file to their Office of Central Operations in Baltimore, Maryland.

motion based upon its findings, as articulated in the July 11 Order, that it did not have jurisdiction to hear claims relating to past and present entitlement of benefits: *See* August 16, 2001 Order Denying Application for Temporary Restraining Order ("August Order") at 6:13;16. The Court rejected the government's argument, however, that Plaintiffs due process claim was moot because of the SSA's recent decision to grant Plaintiff an ALJ hearing on August 27, 2001. *See id.* at 8:6-21. It made its, decision because it was not absolutely clear the allegedly wrongful behavior would not recur and because it was not clear whether Plaintiff's due process rights were already violated by the delay. *See id.*

On August 27, 2001, Plaintiff presented his appeal to the ALJ After consideration of all of the evidence presented, the ALJ found Plaintiff had completed a 9-month trial work period in 1981, his disability ceased as of January 1988 due to his demonstrated ability to engage in substantial gainful activity, and he was not entitled to benefits under Title II as of April 1988. *See* Plaintiffs Opposition to Cross Motion, Reply to Motion ("Mot. Rep."), Exh. 6 (ALJ Decision). The ALJ further found Plaintiff had been disabled under Title II since January 1, 1991, and through August 30, 2001; he was entitled to both monthly benefits and Medicare at all times since January 1991; and although Plaintiff should not have been paid benefits between April 1988 through December 1990, the SSA would waive any overpayment of benefits because Plaintiff was not "at fault," and because Plaintiff was fiscally incapable of covering his ordinary living expense. *See id.* Social security payments were restarted on August 31, 2001. *See* Jacobson Decl. at ¶¶ 8-9.[4] The ALJ Decision became final when Plaintiff allowed the time to appeal lapse without seeking appeal.

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[4] Plaintiff Medicare coverage had been terminated in April 2001, and was restarted in November 2001. *See* Jacobson Decl. at ¶¶ 8, 10.

On November 8, 2001, the Clerk of the Court entered judgment because the Court had denied Plaintiff's. motion for declaratory relief and injunctive relief Plaintiff moved for relief from the Clerk's judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure and requested the Court entered judgment in his favor. He further requested attorney's fees and costs under the EAJA.

The Court granted relief from judgment on January 11, 2002, on grounds the entry of judgment was in error. *See* January 11, 2002 Order Granting Motion for Relief from Judgement ("January Order") at 4:18-5:1. Indeed, Plaintiffs due process claim remained and, as such, entry of judgment was premature. *See id.* On the same basis, the Court denied Plaintiff's request for entry of judgment in his favor. *See id.* at 5:1 n.3. It further denied Plaintiff's request under RAJA. on a finding Plaintiff failed to establish it was a prevailing party, as he must. *See id.* at 6:1-9:6.

LEGAL STANDARD

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). The moving party bears the initial burden of establishing that there is no genuine issue of material fact. *Id.; Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the moving party does not bear the burden of proof at trial, the initial burden of showing that no genuine issue of material fact remains may be discharged by demonstrating that "there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. The moving party is not required to produce evidence showing the absence of genuine issues of material fact. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990). Nor must the moving party support his or her own motion with evidence negating the non-moving party's claim. *See id.*

After the moving party makes a properly supported motion, the responding party must present specific facts showing that contradiction is possible. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 950-52 (9th Cir. 1978). It is not enough for the responding party to point to the mere allegations or denials contained in the pleadings. Instead, it must set forth, by affidavit or other admissible evidence, specific facts demonstrating the existence of an actual issue for trial. The evidence must be more than a mere "scintilla;" the responding party must show that the trier of fact could reasonably find in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). However, in. reviewing a motion for summary judgment, the Court does not make credibility determinations with respect to evidence offered, and is required to draw all inferences in the light most favorable to the non-moving party. *See T W Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). Summary judgment is therefore not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts . . . ." *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 (9th Cir. 1980).

DISCUSSION

Plaintiff now moves for summary judgment on the due process claim, arguing that by failing to consider medical records prior to termination and instead terminating benefits on grounds of SGA, Defendants violated Plaintiffs due process rights. *See* Plaintiffs Motion for Summary Judgment ("Mot."). Indeed, according to Plaintiff, regardless of whether the denial was non-medical, the SSA knew Plaintiff was disabled 'and should have reviewed Plaintiff's medical records and confirmed Plaintiff was disabled. *See id.* Moreover, Plaintiff argues, by terminating benefits without a hearing prior to termination, Defendant violated Plaintiffs due process rights as he was not gainfully employed and was at great risk of losing his livelihood, not having enough money

to pay his rent, to pay for food or continued medical treatment. *See id.* at 13-14. Given his condition argues Plaintiff, the lapse of time,[5] from the date first terminated to the date Defendants reinstated benefits, was too long. *See id.* at 13.

Defendant opposes the motion and brings a cross motion on grounds there is no outstanding case or controversy, or available remedy. *See* Defendant's Opposition to Mot. and Cross Motion ("Mot. Opp.'") at 4:1-7:6. It further contends the SSA .procedures are adequate and do not constitute a violation of due process, even as applied to Plaintiff. *See id.* at.7:7-15:28. In arguing no due process violation occurred, Defendant asserts there is no factual dispute as to Plaintiff's waiting period for his ALJ hearing and decision. *See id.* at 8:20-22. The Court addresses each of the arguments below, beginning with Defendant's contention regarding jurisprudence.

A. Article III

To satisfy Article HI standing requirements for a federal court action; a plaintiff must show that he suffered an injury in fact, that the injury is fairly traceable to the challenged action of the defendant, and that it is likely a favorable decision would address the injury. *See Friends of the Earth v. Laidlaw Environ. Servs.*, 528 U.S. 167, 180-81 (2000). An actual controversy must be .extant at all stages of review. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997).

Defendant argues there is no outstanding case or controversy, or available remedy. *See* Mot. Opp. at 4:1-7:6. Specifically, Defendants contend in August 2001, the AU issued a mostly favorable decision by restarting his benefits,

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[5] In his papers, Plaintiff claims there was a lapse of 458 days. It is unclear to the Court how Plaintiff came upon the 458 days figure as benefits-terminated in October 2000, and payment resumed on August 31, 2001.

paying hint retroactively owed benefits, and waiving recovery of overpaid benefits for the years 19884 990. *See id.* (citing ALJ Findings). Thus, according to Defendant, Plaintiff already received the only remedies available to him under Title II, a hearing and reinstatement of benefits. *See id.* at 4:17-24.

Plaintiff contends his benefits were wrongfully terminated by Defendant which intentionally ignored pertinent information proving disability. The Supreme Court, however, in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), found the erroneous termination of social security disability benefits is not the basis for a due process suit. *See id.* at 428-29. The Supreme Court made this finding despite allegations state and federal officials would, among other things, intentionally disregard favorable dispositive evidence in terminating benefits. *See id.* at 418.

Because the Supreme Court has already deter .ed that even where intentional conduct is involved, the wrongful termination of benefits does not constitute a basis for a due process violation, Plaintiff's arguments, to the extent based on SSA's conduct in ignoring medical evidence when terminating benefits do not form the basis of the due process claim. This is especially true here since Plaintiff allowed the ALJ's decision to go final, without seeking appeal.

Having found that, Plaintiff premises part of his due process claim on the time involved before the ALJ would hear his appeal. That the appeal was heard on August 27, 2001, did not dispose of his due process claim entirely as Plaintiff objects to the time already passed, namely since March 2001, when he requested a hearing.[6] Indeed, this is the

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[6] According to Defendant, between March and August 2001, the average number of reques.s for hearings pending was 998, in San Francisco alone. See Declaration of Serena Hong ("Hong Decl.") at ¶ 5. The average time between the request for hearing and the actual hearing was 244 days. *See id.*

precise ruling made by the Court with its August Order. *See* August Order at 7:10-8:23. The Court, therefore finds, for the second time, jurisprudence is not lacking.

B. Due Process Claim

A colorable Constitutional claim of due process violation is anf exception to the jurisdictional limitations of the Act. *See Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997) (finding that "the exception applies to any colorable constitutional claim of due process violation-that implicates a due process right either to a meaningful opportunity to be heard or to seek reconsideration of an adverse benefits determination"). The fundamental requisite of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

Due 'process is "flexible and calls for such procedural protections as the particular situation demands?' *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976). In determining whether the SSA administrative procedures were constitutionally sufficient, the *Matthews* Court balanced the following factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedure requirement would entail. *See id.* at 334-35.

Instructive in the analysis of whether the administrative process involved here violated Plaintiffs due process rights are two cases: *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Matthews v. Eldridge*, 424 U.S. 319 (1976). The Supreme Court in *Goldberg* determined the procedures involved in. denying welfare benefits to its recipients violated due process when it provided for no pre-termination hearing. *See*

Goldberg, 397 U.S. at264. In considering the first factor, the Court found the private interest impacted by the denial of benefits was great as welfare "provid[ed] the means to obtain essential food, clothing, housing and medical care." *Id.* at 264. According to the Court, termination of aid pending resolution of a controversy over eligibility could deprive an otherwise eligible recipient of the "very means by which to live while he waits." *Id.*

With respect to the second factor, the *Goldberg* Court determined a pre-termination hearing was necessary because "credibility and veracity are at issue" and "written submissions are a wholly unsatisfactory basis for decision." *Goldberg*, 397 U.S. at 268-69. Finally, it found important government interest were promoted by affording welfare recipients a pre-termination evidentiary hearing, especially since promoted general welfare of the public and secured the "blessings of liberty to ourselves and our posterity." *Id.* at 264-65. Any interest in conserving fiscal and administrative resources, it determined, were not overriding in the welfare context, and any drain could be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. *See id.* at 266.

In *Matthews*, the Supreme Court found the procedures followed by the SSA in terminating Title 1T disability benefits were constitutionally valid, and that an evidentiary hearing was not required prior to termination to protect a recipients due process fights. *See Matthews*, 424 U.S. at 349. The Court found the impact on claimant's interest in the uninterrupted source of income pending a final administrative decision on his claim was less devastating than that of welfare recipients. *See id.* at 34043. The basis for its determination was that eligibility for disability was not based on a financial need, and, as such, a disabled worker's need was "likely to be less than that of a welfare recipient." *Matthews*, 424 U.S. at 342. Indeed, although the Court recognized terminated

recipients and their families could suffer "significant" hardships, the recipient would have the "possibility of access to private resources, [and) other forms of government assistance . . . ." *Id.* "In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle . . . that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 343. The Court made this determination despite having recognized that the delay between a request for hearing before an AU and a decision on the claim was between ten (10) and eleven (11) months, and the time between the actual termination of benefits and a final decision after hearing exceeded a year. *See id.* at 342.

In considering the second factor, the *Matthews* Court evaluated the impact of adding a pre-termination hearing to the fairness and reliability of the procedures, as it existed. *See Matthews*, 424 U.S. at 343-44. It determined a pre-termination hearing would add little to the procedures already in place because the type of determination already required in the continued eligibility determinations of social security disability benefits involved "sharply focused and easily documented" matters, unlike the credibility determinations made by administrators in the welfare arena as discussed in *Goldberg*. *Matthews*, 424 U.S. at 343. The factors considered, including whether the claimant could engage in SGA, were described as "amenable to effective written presentation." *Id.* at 344 n.28.

Finally, the Supreme Court determined the administrative burden and other societal costs associated with requiring a pre-termination hearing would be great. *See Matthews*, 424 U.S. at 347. It further found the constitutional system did not require the imposition of judicial type procedures on administrative action to assure fairness, and that all that is required is that "the procedures be tailored, in light of the decision to be made to `the capacities and circumstances of

those-who are to be heard [citation omitted] to insure that they are given a meaningful opportunity to present their 'case.'" *Id.* at 348-39. It concluded as follows:

> In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. [citation omitted]. This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final.

Id. at.349. With these two cases in mind, the Court considers the factors necessary to determine whether the administrative procedure here violated plaintiff's due process rights.

1. Plaintiffs Interest Affected by Defendant's Conduct

In the context of reviewing the procedure in connection with the administration of welfare benefits, the *Goldberg* Court found the effect of the defendant's conduct on the welfare recipient's interest was great, as it went to the core of the recipient's ability to exist. *See Goldberg*, 397 U.S. at 264 (finding "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate."). In the context of reviewing procedures in connection with the administration of disability benefits, the *Matthews* Court found the effect of the SSA's conduct on the recipient was less devastating, because disability recipients had access to potential sources of temporary income as the

benefit was not based on financial need. *See Matthews*, 424 U.S. at 340-43.

Plaintiff here was a recipient of disability, not welfare, benefits. As such, the *Matthews* Court's characterization of the affect of the SSA's conduct on disability benefit recipients would appear to apply. Plaintiff, however, argues it does not. Specifically, the termination of benefits here affected Plaintiff by rendering him unable to pay rent, buy food or seek medical assistance. *See* Mot. Rep, at 9:16-10:1. According to Plaintiff, his unique circumstances equated him the welfare recipients in *Goldberg*, about whom the Supreme Court found termination of benefits would have a profound impact.

Defendant counters the instant action is exactly like the scenario discussed in *Matthews* and the *Matthews* Court characterization should apply. Specifically, according to Defendant, Plaintiff had personal resources, having earned roughly $9,570 in 1999, and $7,120 in 2000. *See* Jacobson Deck at ¶ 4. In addition to the money earned, Plaintiff further received social security benefits for most of 2000. *See id.* at ¶¶ 5, 8. Moreover, like the plaintiff in *Matthews*, Defendant contends Plaintiff had access to public assistance pending further administrative review, having in fact applied to other assistance during the time terminated. *See* Mot. Rep. at 10:14-15.

While sympathetic to the dire circumstances alleged to have been faced by Plaintiff, the Court is not persuaded *Matthews* does not apply. Specifically, with its cross motion, Defendant f submits, and Plaintiff does not contest, evidence of some personal resources, albeit not in any significant amounts. Plaintiff himself further attested he had in fact applied-for other public assistance during the period terminated. As such, like in *Matthews*, while the hardship suffered by Plaintiff with-the erroneous termination of benefits may have been significant, Plaintiff here had "potential sources of

temporary income." On this basis, the Court is not persuaded by Plaintiff to depart from the findings of the *Matthews* Court. With this determination in mind, the Court turns to the remaining factors.

2. Probative Value of Additional Procedures

Although unclear, Plaintiff suggests two additional procedures which he contends are required here to protect his due process rights. First, by contesting the delay between termination and the ability to appear before the AU during which Plaintiff received no benefits, Plaintiff contends termination prior to hearing violates his due process rights, especially since, in his case, he was without benefits for nearly a year since termination. As such, the first additional procedure suggested is an immediate review, or, the imposition of a pre-termination hearing.

Second, Plaintiff argues the SSA violated his due process rights by failing to consider medical evidence demonstrating he was disabled. *See* Mot. at 7:27-8:11. As such, Plaintiff appears to suggest requiring a mandatory review of medical evidence, even when termination is based on non-medical grounds. The Court, in keeping with the *Matthews* factors, considers the probative value of both additional procedures in turn below.

a. Immediate Review by ALJ and/or Pre-Termination Hearing

In determining a pre-termination hearing was not required for the social security procedures to comport with due process, the *Matthews* Court found that in the context of administering social security disability benefits, a hearing was not required to effectively establish eligibility because evidence was more amendable to written, as opposed to oral, presentations. *See Matthews*, 424 U.S. at 343-44, n.28; *compare Goldberg*, 397 U.S. at 269 (folding written presen-

tations wholly unsatisfactory where criteria for eligibility included witness credibility amid veracity).

Here, Plaintiff does not assert the SSA failed to give him time to submit written presentations as to why benefits should not be terminated before the benefits were in fact terminated.. Plaintiff further does not provide that had he followed the procedure available, namely submitting written presentations as to eligibility, the procedure would have been insufficient. Instead, the record seems to indicate otherwise. According to Defendant, Plaintiff was sent a Notice of Proposed Decision to terminate, with instructions stating he could submit further evidence for consideration within ten (10) days, *See* Worms Decl., Exh. 2. Plaintiff's counsel did in fact review the file after receipt of notice, but did not make further submissions. *See id.* at ¶ 5.

There is no evidence showing that had he submitted the medical evidence establishing disability, the SSA would have decided not to terminate benefits. However, by having failed to submit written presentations when afforded the opportunity, Plaintiff is unable to demonstrate that the criteria for eligibility in the administration of disability benefits was not amenable to written presentations. Moreover, with the declarations of Plaintiff and doctors Plaintiff does submit, Plaintiff appears to support the *Matthews* Court decision that the criteria in determining eligibility to disability benefits is easily documented. In light of this finding, the Court fails to see why either an immediate appeal or a pre-termination hearing would have any probative impact on the process already in place, even as applied to Plaintiff.

b. Review Medical Evidence Before Termination on SGA Basis

Defendant counters the procedures taken by it were in compliance with terminations based on non-medical reasons, such as terminations based on a finding of SGA. *See* Mot.

Opp. at 14:9-45:4. Plaintiff does not dispute the procedures .followed by Defendant in Processing the appeal complied with terminations for non-medical reasons, only arguing Defendant knew Plaintiff was still disabled yet failed to consider medical evidence before terminating benefits. *See* Plaintiff's Reply. Opposition to Cross Motion ("Mot. Rep.") at 2:15-3:9.

As determined before, the Court finds Plaintiff failed to frame a due process violation,[7] but instead raises the issue of whether current SSA regulations require medical evidence to be taken into account before termination of his benefits on a non-medical basis. Plaintiff's argument requires an analysis of current SSA regulations and their applicability in his case, and does not raise a constitutional issue. *See* July Order at 9:9-11:2.

Moreover, wrongful termination of benefits does not constitute a violation of due process, even if there is evidence the officers reviewing the criteria intentionally ignored pertinent evidence establishing eligibility. *See Schweiker*, 487 U.S. at 418, 428-29. As such, the Court could not find the failure to consider medical evidence before terminating for non-medical reasons constitutes a due process violation, especially since the failure to consider evidence is not the basis of a violation at all, according to *Schweiker*. The Court

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[7] The Court, in its order, instructed that to state a due process claim that the review of medical evidence prior to termination of Title II benefits is Constitutionally required, Plaintiff would need to allege that a failure to take such evidence into account is so unreasonable that it affords him no process at all. *See* July Order at 9:10-16 (citing, among others, *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir.1988) (holding that "to establish a violation of substantive due process, a plaintiff is ordinarily required to prove that a challenged government action was 'clearly arbitrary and unreasonable, ordinarily required to prove that a challenged government action was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,'")).

therefore finds there is little or no probative value to requiring the Defendant review medical records when terminating benefits for non-medical reasons.

3. Governmental Interest/Impact of Additional Procedure on Fiscal and Administrative Burdens

In *Matthews*, the Supreme Court determined the administrative burden and other societal, costs associated with requiring a pre-termination hearing Would be great, giving "substantial" weight to the judgments of those persons administering disability benefits. *See Matthews*, 424 U.S. at 347. Plaintiff does not, with his motion; provide the Court with any indication why it should depart from the findings of the *Matthews* Court, not even arguing the third factor should be analogized to the *Goldberg* Court's discussion in the context of administering welfare benefits.

Defendant, on the other hand, provides evidence the burden on the administration and society would be no different, if not greater, than when the *Matthews* Court made its determination. Specifically, Defendant submits evidence there were an average of 998 requests for AU hearings in San Francisco alone between March 2001, when Plaintiff requested a hearing, and August 2001, when the ALT scheduled and heard the appeal. *See* Hong Decl. at ¶ 5. In addition, there was an average wait of 244 days between requesting a hearing and actually being heard. *See id.* As such, and according to Defendant, by requiring a pre-termination hearing, costs would be increased significantly and claimants waiting for review might be adversely affected.

The Court finds Defendant's arguments persuasive, Indeed, there are a large number of claimants seeking hearings. The cost of providing benefits until a hearing is had for each of the claimants seeking review would be high as other claimants waiting for review would be delayed further. This is especially true where, as here, Plaintiff has not established

his interests affected were greater than that of the *Matthews* plaintiff, and that anything could be gained by the additional procedures suggested. *Compare Goldberg*, 397 U.S. at 266 (finding where termination of welfare benefits involved, the interest in conserving costs failed to override the impact of terminating benefits, and the value of oral presentations in assessing eligibility).

4. Other Grounds

a. Notices

Plaintiff further argues that the notices issued by the SSA were unconstitutionally vague. As with the argument above, Plaintiff made this argument earlier and the Court rejected it *See* July Order at 8:25-9:8. The Court, therefore, again finds this argument without merit.

b. Misrepresentations

Plaintiff alleges the SSA intentional misrepresented various SSA rules and procedures concerning Medicare coverage and the "Ticket to Work" provisions in depositions, briefing submitted and at hearings in connection with this action. *See* Mot. at 8:20-9:16. The Court is unclear how misrepresentations, if any made, by the SSA in connection with this action interfered with Plaintiff's due process rights as he was represented, and he obtained an ALJ hearing within five months of his request. On this ground, therefore, the Court finds Defendant had not violated Plaintiff's due process rights.

5. Conclusion

After careful consideration of the factors articulated in *Matthews*, the Court is unable to see how Plaintiff is in a situation different from any of the other thousands of recipients of disability benefits, so much so that the application of normal administrative procedures would violate his due process rights when the Supreme Court has already determined

that the exact same procedures comport with due process. It also is not persuaded that the imposition of deadlines for ALJ hearing, the imposition of a pre-pre-termination hearing, or the requirement that the SSA review medical evidence prior to termination for non-medical reasons would have any impact on the system in play.

The Court makes these findings without diminishing the difficulty Plaintiff claims to have faced during the termination. Indeed, it is aware, having been advised, Plaintiff incurred credit card debt, borrowed money from friends and. family just to survive, feared losing his home, and had to terminate medical care with his preferred physician. The same considerations have been considered by other courts which have upheld the constitutionality of these very same procedures. Indeed, the Supreme Court in *Schweiker* put it best when it determined:

> [T]hat suffering months of delay in receiving the income on which one has depended for the very necessities of life cannot be fully remedies by the "belated restoration of benefits." The trauma to respondents; and thousands of others like them, must surely have gone beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens. Nor would we care to "trivialize" the nature of he wrongs alleged in this case. Congress, however; has addressed the problems created by state agencies' wrongful termination of disability benefits. Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program. Congress has discharged that responsibility to the extent that it affects the case before us, and we see no legal basis that would allow us to revise its decision.

Schweiker, 487 U.S. at 428-29.

Because Plaintiff fails to establish he is entitled to judgment as a matter of law, the Court finds Plaintiff does not prevail on his due process claim. Rather, Defendant succeeds in demonstrating the process, as currently administered, protects the due process rights of all, including Plaintiff Accordingly, Plaintiffs motion is DENTED, and Defendant's motion is GRANTED.

CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiff's motion for summary judgment; and GRANTS Defendants' cross-motion. Plaintiffs prayer for relief, including the request pursuant to the BAJA, is DENIED.

IT IS SO ORDERED.

Dated October 16, 2002

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

EXHIBIT 14

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed July 03, 2002]

No. C 01-0895 MJJ (JL)
DISCOVERY ORDER

TIMOTHY GIBLER,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,

INTRODUCTION

Plaintiff Timothy Gibler's Motion to Compel the Production of Documents and Depositions[1] [Document Number 57 on the court's docket] came on for hearing June 26, 2002. Steven Bruce appeared on behalf of Plaintiff. Geralyn Gulseth appeared on behalf of Defendant, Jo Anne Barnhart, Commissioner of Social Security, ("Defendant"). The court heard oral argument and took the matter under submission.

BACKGROUND

I. Facts

Plaintiff is an individual with a severe psychiatric disorder who has been receiving benefits under Title II of the Social

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[1] There was also a request to shorten time in order for the motion to be heard prior to the hearing on the motions for summary judgment. The district court vacated the hearing date, which mooted the request to shorten time, which is therefore denied.

Security Act since 1979. While he was receiving benefits, Mr. Gibler underwent several continuing disability reviews by doctors contracted by the State Agency whose role, pursuant to the Social Security Act, is to conduct medical evaluations ensuring claimants remain disabled within the meaning of the Act.

On January 15, 2000, Plaintiff filled out a form entitled "Report of Work Activity-Continuing Disability", where he for the first time reported his sporadic paid work singing for church choirs. He had been singing for the choirs since October 1979. On July 26, 2000, the Social Security Administration ("SSA") provided Gibler with a "Notice of Proposed Decision" that his reported work could affect his benefits and that he had ten days in which to provide more information before a final decision and Notice of Termination. Gibler contends, and the Acting Commissioner does not dispute, that Gibler's medical record was not taken into account in reaching this determination. In December 2000 Plaintiff did not receive his benefits check, and his attorney filed a Request for Reconsideration even though no Notice of Termination had been issued. At that time, Gibler requested that he continue receiving benefits. His request was denied.

Gibler, through his attorney, contacted staff in multiple departments of the SSA during January and February 2001, to request reinstatement of his benefits and a medical examination to evaluate his continuing disability, but neither was forthcoming. On February 13, 2001, Gibler received a notice informing him that he no longer qualified for Social Security benefits due to his work activity, and that his benefits were discontinued retroactive to March 1988. (Defendant's Opposition to Plaintiff's Motion to Compel, pg. 2.). On August 30, 2001, the Administrative Law Judge ("AU") affirmed Social Security's finding that Plaintiffs disability had ceased in January 1988 due to his work activity, (Defendant's Opposition to Plaintiff's Motion to Compel, pg. 2, lines 4-5).

II. Procedural History

On March 2001, Plaintiff filed a petition for Writ of Mandamus, alleging that Defendant violated Plaintiff's due process rights Under the Fifth Amendment of the United States Constitution by failing to hold a hearing prior to the termination of his disability benefits. *Goldberg v. Kelly*, 397 U.S. 254, 275 (1:970.) However, the court in *Goldberg* held that the Due Process Clause requires that a recipient be afforded an adequate evidentiary hearing before the termination of welfare benefits, and the fact that there is a subsequent constitutionally fair proceeding does riot alter the result. *Id.* at 260. The Goldberg holding is restricted to welfare benefits, as distinguished from disability benefits. *Id.*

In May 2001, the Defendant moved to dismiss the petition for lack of subject matter jurisdiction. At that point, the Defendant had denied Plaintiff's request for reconsideration, but Plaintiff had not yet exhausted his administrative remedies through the hearing and Appeals Council level of administrative review. 20 C.F R. §§ 404.900, *et.seq.* (2001).

The district court (Hon. Martin J. Jenkins) denied the Defendant's motion to dismiss for lack of subject matter jurisdiction on July 11, 2001. The court found no basis for mandamus jurisdiction. The court also determined that it did not have jurisdiction over Plaintiff's substantive claim for past or present Social Security benefits. (Defendant's Opposition to Plaintiff's Motion to Compel, pg. 2, line 12).

However, the court found that Plaintiff had raised a colorable constitutional issue that the delay in obtaining a hearing violated his due process rights. The court did not rule on the issue of whether the SSA's scheme for review of a work activity cessation was unconstitutional as applied to Plaintiff.

In July 2001, Plaintiff moved for declaratory and preliminary injunctive relief. The Defendant opposed Plaintiffs

motion and informed the court that Plaintiff's claim was still pending before an ALJ at the hearing level of review. (Defendant's Opposition to Plaintiffs Motion to Compel, pg. 2).

On August 10, 2001, the court denied Plaintiff's motion for declaratory and preliminary injunctive relief. However, the court found that the scheduled hearing did not render Plaintiff's due process claim "moot", because Plaintiff could legitimately contend that his due process rights had already been violated by the delay in obtaining a hearing and by the fact that the AU did not address all of his claims. (Defendant's opposition to Plaintiff's Motion to Compel, pg. 2, lines 20-28).

After the court denied injunctive and declaratory relief, the All held a hearing on August 27, 2001, and issued a decision on August 30, 2001. (See Exhibit 1 of Plaintiff's Motion for Relief From the Judgment). The All's decision was mostly favorable to Plaintiff. First, the AU affirmed Social Security's finding that Plaintiffs disability had indeed ceased in January 1988 due to his work activity. However, the AU found that Plaintiff became disabled again in January 1991 and that he continued to be disabled through the date of the August 2001 decision. Thus, Plaintiff was entitled to all of the benefits he had received since January 1991, as well as continuing benefits and Medicare coverage. Furthermore, the AU waived recovery of the overpayment of benefits resulting from Plaintiff's work activity for the years 1988, 1989, and 1990. Therefore, Plaintiff did not have to repay the Social Security Administration for the benefits he received during those years.

In Defendant's Opposition to Plaintiff's Motion to Compel, Defendant asserts that "there is no further remedy that can be achieved by Plaintiff in this action because he has received the only remedy provided by the Social Security Act: retroactive benefits." (Defendant's opposition to Plaintiff's Motion to Compel, pg. 4, lines 19- 21). Plaintiff argues that

his monthly check is lower than it was before SSA cut off his benefits. However, Plaintiff's dispute with the calculation of benefits is not an issue before this court. The district court has ruled that it has no jurisdiction over the substantive claims of entitlement. (Defendant's opposition to Plaintiff's Motion to Compel, pg. 4, footnote 2.)

On November 8, 2001, the Clerk of the court entered a judgment denying Plaintiff's motion for declaratory and injunctive relief. Plaintiff moved for relief from the Clerk's entry of judgment pursuant to FRCP 6O and requested that the court enter judgment in his favor.

The district court granted relief from the judgment on January 11, 2002. The court explained that the Clerk had erroneously entered judgment while the Plaintiff's due process claim was still outstanding. However the court denied Plaintiff's motion to enter judgment in his favor and denied his motion for attorney's fees.

On February 14, 2002, Plaintiff moved for summary judgment. The Defendant opposed the motion, and moved for summary judgment on the due process claim on April 16, 2002. However, the hearing on these pending motions has been postponed because Plaintiff claims that discovery is necessary to flesh out his motion.

III. This Motion

On April 29, 2002, Plaintiff moved for an Order compelling Defendant to produce nine depositions and two documents (one cassette tape and one Notice of Award). Specifically, plaintiff requests (1) to take the depositions of nine Social Security employees, (2) a tape of his August 2001 hearing before the AU; and (3) a copy of the Notice of his Award of benefits pursuant to the ALJ's August 30, 2001 decision. (*See* C.R. 72-74: Plaintiff's Motion to Compel Production of Documents tone Tape and Notice of Award)

and the Taking of Depositions.[2] The Defendant requests that this court find that discovery is unnecessary at this time and stay discovery until the District Court decides the parties' pending cross- motions for summary judgment.

On May 30, 2002, the Assistant United States Attorney Mailed a cassette tape of Plaintiff's August 30, 2001 administrative hearing to Plaintiff's counsel. In addition, pursuant to the Privacy Act, Defendant provided documents related to Plaintiff's Social Security claims, including in a Notice of Award letter informing Plaintiff that his payments would begin in August 2001. The only document withheld by Defendant was a privileged attorney-client communication.

Since the Tape, and Notice of-Award have been provided to Plaintiff by Defendant, the only remaining issue before this court is whether Defendant must produce the nine individuals to testify about the proceedings leading up to the termination of Plaintiff's Social Security benefits.

Plaintiff seeks to question the deponents as to:(1) why the Social Security Administration (SSA) employees sent Mr. Gibler's file to Baltimore; (2) whether an Administrative Law Judge has jurisdiction over due process issues; (3) whether Defendant knew of Plaintiffs financial status at the time that Plaintiff's benefits were terminated without a prior *Goldberg v. Kelly* due process hearing.

Defendant opposes Plaintiffs motion to compel on the basis of relevance. Defendant asserts that there-are no genuine issues of material fact which require the nine depositions and that, contrary to Plaintiff's contentions, the only remaining issue in this case is whether the Plaintiffs due process rights were violated by his having to wait for a post- termination of benefits hearing before an ALJ. "Defendant claims that this is an issue of law and does not involve disputed facts.

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[2] "C.R." is the Clerk's record of documents filed in this case.

As stated above, Defendant asserts that there are no further remedies that can be obtained by Plaintiff in this action because he has already received the only remedy provided by the Social Security Act: retroactive benefits.[3] *Schweiker v. Chilicky*, 487 U.S. 412, 428- 429 (1988). Defendant further asserts that under *Schweiker* there are no money damages available for alleged constitutional violations committed by the SSA. *Id.* At 112.

ANALYSIS

I. General Statement of the Law: Relevance of Documents.

Under Fed. R. Civ.P. 26(B)(1), parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the claims and defenses of a party. Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. FRCP 26(b)(1). This rule is subject to limitations as provided in FRCP 26 (b)(2).

Under Rule 26(b)(2), although certain documents may be relevant to the claims and defenses of both parties and are reasonably calculated to lead to. the discovery of admissible evidence, if the discovery sought is obtainable from some other source that is "more convenient, less burdensome, or

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[3] The Commissioner has since paid Plaintiff his benefits for the relevant period. *See* C.R.71. Plaintiff argues that his monthly benefit amount is lower than it was before SSA terminated his benefits. Plaintiffs Motion to Compel, p. 4. However, this dispute regarding the calculation of benefits is not at issue before this court.

less expensive", then discovery should be obtained from that source. FRCP 26(b)(2).

A) The Government has produced the Hearing Tape and Notice of Award Letter.

The Tape and the Notice of Award letter sought to be discovered by Plaintiff are relevant to the claims and defenses of both parties. Both documents are reasonably calculated to lead to the discovery of admissible evidence. The tape of the hearing has been provided.

In Plaintiffs Reply he asserts that Defendant's statement that she has supplied the Notice of Award is misleading. The benefits which resumed in August 2001 were not a result of the hearing held on August 29, 2001, but were pursuant to separate application filed in January, 2001. The original Notice of Award is dated August 27, 2001 (two days before the hearing of August 29, 2001 took place). In other words, there may be two Notices of Award. Plaintiff contends that the Notice of Award he received is defective, because it did not explain how monthly fees were calculated, and therefore, formed no objective basis for appeal. If such a second notice exists, Plaintiff should be given the second Notice of Award as well. It is so ordered.

B) Relevance of Nine Depositions.

1) Jurisdiction

This court has ruled that it has "no jurisdiction over Plaintiff's claim with regards to past and present Social Security benefits". (Defendant's opposition to Plaintiff's Motion to Compel, pg. 2, line 12). This court also declined to find jurisdiction over Plaintiff's claim that "SSA's notices were inadequate." (Defendant's opposition to Plaintiff's Motion to Compel, pg. 6). Consequently, any inquiry into these areas would be Irrelevant.

2) Relevance

a) Whether the Depositions are Necessary and Relevant to Determine Whether it was Proper for the SSA to Send Plaintiff's File to Baltimore, and Whether the SSA did so intentionally and maliciously'.

Plaintiff argues that he must depose these employees to show that the SSA allegedly "intentionally and maliciously" sent his file to Baltimore for the reconsideration. C.R. 72- 74: Motion to Compel, ¶ 2-3, 7. Plaintiff also claims that the employees deprived him of his right to a *Goldberg v. Kelly* due process hearing.

Defendant contends that whether its scheme of administrative review of violated Plaintiff's rights is a legal issue that can be resolved without more discovery on the present record.

The potential deponents are: Donald Worms; and Curtis Faville—claims representative; John Hanley—supervisor who handled the initial cessation review; Royce Hanley and her supervisor in SSA's Office of Central operations in Baltimore, the individual who handled the reconsideration review; AU Neil Aschemeyer—who heard Plaintiff's claim in August 2001 and issued a mostly favorable decision); John Larimore—an employee in the Congressional Unit in SSA's Regional Commissioner's office, whom Plaintiff's attorney contacted during the initial stages of administrative review; and Carolyn Goodwin—a SSA employee in Baltimore contacted about administrative remedies available to Plaintiff. (The Administrative Chief Judge of SSA's Region IX, Arthur Cahn, has no personal knowledge:of this case.) (Memorandum in Support of Defendant's Motion to Stay Discovery and in opposition to Plaintiff's Motion to Compel Discovery, pg. 5).

Defendant asserts that testimony from the nine deponents is not required to resolve the due process question. (Defendant's

opposition to Plaintiff's Motion to Compel, pg. 6, lines 3-4). Defendant states that the SSA employees complied with the regulations for reviewing a benefit cessation based on work activity. (Defendant's opposition to Plaintiff's Motion to Compel, pg. 6, lines 1-2). Moreover, Defendant asserts that even if the SSA employees acted incorrectly, Plaintiff can seek no further remedy because the only remedy provided by the SSA is retroactive benefits, which Plaintiff has already received. *Schweiker v. Chilicky*, 487 U.S. 412, 428- 429.

This court finds that Judge Jenkins may well be able to decide the motions without the nine depositions requested by Plaintiff. If not, the court may revisit the issue.

b) Whether Discovery of the Nine Depositions is Necessary and Relevant to Determine if an Administrative Law Judge has the Authority to Adjudicate Due Process Issues.

Whether an All has the authority to adjudicate due process issues is a question of law for the court to decide. Thus, discovery of the nine deponents in this context is not necessary.

c) Whether Discovery of the Nine Depositions is Necessary and Relevant to Determine Whether SSA Employees Knew that Plaintiff was Indigent and at Risk of Losing his Medical Care when his Disability Benefits were Terminated.

Plaintiff argues that he needs to question these nine SSA employees to determine whether they knew he was indigent and at risk of losing his medical care when his disability benefits were terminated. However, as Defendant argues, the issue is not whether the Commissioner knew about Plaintiff's circumstances at the time Plaintiff's benefits were terminated, but whether Plaintiff's due process rights were violated as a result of the termination of his disability benefits.

Plaintiff argues that he was not afforded a due process hearing as required by Goldberg and that the nine depositions are necessary to determine if his due process rights were violated. A determination of whether Plaintiffs due process rights were violated as a result of the termination of his disability benefits can be derived from a review of the SSA regulations and internal policy manual and the present record.

Specifically, 42 U.S.C.A. §§ 405 (b)(1) governs the proper procedures that the SSA must follow when terminating an individual's disability benefits. As Defendant states in her opposition to Plaintiff's Motion to Compel," [T]he issue of whether Commissioner's scheme of administrative review of Plaintiff's benefit cessation violated his rights can be resolved without discovery of the SSA decision-makers and their supervisors who worked on or helped to effectuate Plaintiff's administrative appeal." (Defendant's opposition to Plaintiff's Motion to Compel, pg. 5, lines 13-14). The SSA regulations and internal policy manual outline the current procedures to terminate disability benefits. Review of the SSA regulations and internal policy manual is "more convenient, less burdensome, and less expensive" for both parties. FRCP 26(b)(2). Thus, it is not necessary to take the nine depositions requested regarding disability termination procedures.

The present administrative procedure is outlined in 42 U.S.C.A. § 405(b)(1), which states that "upon request by any such individual . . . who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and an opportunity for a hearing with respect. to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision." 42 U.S.C.A. § 405(b)(1).

Section 405(b)(1) was last amended in 1994, and the substantive changes in 1994 within section 405(b)(1) do not affect the requirement that an individual must be given "reasonable notice and an opportunity for a hearing with respect to the adverse decision". 42 U.S.C.A. § 405(b)(1). In October 2000 when Plaintiff's Social Security checks were terminated, the 1994 version of § 405(b)(1) was controlling. A review of 42 U.S.C.A. § 405(b)(1) along with SSA regulations, SSA procedures, and the administrative record may be the SSA internal policy manual sufficient to determine whether Plaintiff's due process rights were violated by not receiving a hearing. The nine depositions are not necessary at this time to determine whether Plaintiff's due process rights were violated.

Section 12:1 "Constitutional right to hearing" of the Social Security Claims and Procedures states that "Both the Social Security Act and the Due Process Clause of the Fifth Amendment require that a claimant receive an opportunity to personally appear at a hearing, before a claim for disability benefits is denied." Harvey L. McCormick, Social Security Claims and Procedures, Volume Two, § 12:1, pg. 3 (Fifth Edition, West Group 1998). This suggests that a hearing may be required before the termination of disability benefits. If so, Plaintiff should have had a hearing prior to the termination of his disability benefits. In any event, review of the SSA regulations and internal policy manual is an adequate means at this time for the court to assess whether Plaintiff's due process rights were violated by not receiving a hearing prior to the termination of his disability benefits without of the nine depositions.

SUMMARY

Plaintiff alleges that his due process rights were violated When his benefits were terminated. The court may determine whether Plaintiffs due process rights were violated by reviewing the Social Security Administration regulations and

internal policy manual on the present record as suggested by Defendant. The nine depositions are not necessary at this time. The tape and Notice of Award have previously been produced by Defendant. If there is an additional Notice of Award, it shall be produced forthwith. Otherwise, Plaintiff's motion to compel is denied without prejudice. Defendant's motion to stay further discovery is granted.

IT IS SO ORDERED.

DATED: July 2, 2002

/s/ James Larson
JAMES LARSON
United States magistrate Judge

United States District Court for the
Northern District of California
July 2, 2002

* * CERTIFICATE OF SERVICE * *

Case Number: 3:01-cv-00895

GILBER

vs

HALTER

I, the undersigned, hereby certify that I am an employee in the office of the Clerk, U.S. District Court, Northern District of California.

That on July 2, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

STEVEN BRUCE, ESQ.
People With Disabilities Foundation
507 Polk Street, Mezzanine
San Francisco, CA 94102

ALEX G. TSE, ESQ.
U.S. Attorney's office
450 Golden Gate Avenue
P.O. Box 36055
San Francisco, CA 94102

RICHARD W. WIEKING, Clerk
BY: _____
Deputy Clerk

UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF CALIFORNIA

[Filed Aug. 5, 2002]

CASE NO. C 01-0895 MJJ (JL)

TIMOTHY GIBLER,
Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security Administration,
Defendant.

ORDER CONFIRMING STIPULATION TO CORRECTION OF DISCOVERY ORDER DATED JULY 3, 2002

Whereas Plaintiff and Defendant have reviewed Plaintiff's letter of July 16, 2002 relating to a clerical error in said Order hereby stipulate as follows:

On line 9 of page 2 ". . . where he for the first time reported his sporadic paid work singing for church choirs," is deleted, and the following is inserted therein: "As the Administrative Law Judge found in his decision dated August 30, 2001, Mr. Gibler reported his earnings.

Dated: 7/29/02

/s/ Steven Bruce
STEVEN BRUCE
Attorney for Plaintiff

Dated: 7/31/02

/s/ Alex G. Tse
ALEX G. TSE
Attorney for Defendant

IT IS SO ORDERED:

DATED: 8-5-02

/s/ James Larson
HONORABLE JAMES LARSON
Magistrate Judge of the
District Court

United States District Court
for the
Northern District of California
August 5, 2002

* * CERTIFICATE OF SERVICE * *

Case Number: 3:01-cv-00895

GILBER,

vs.

HALTER.

I, the undersigned, hereby certify that I am an employee in the office of the Clerk, U.S. District Court, Northern District of California.

That on August 5, 2002, I SERVED a true and correct copy-(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Steven Bruce, Esq.
People With Disabilities Foundation
507 Polk Street, Mezzanine
San Francisco, CA 94102

Alex G. Tse, Esq.
U.S. Attorney's Office
450 Golden Gate Avenue
P.O. Box 36055
San Francisco, CA 94102

Richard W. Wieking, Clerk

By: /s/ [Illegible]
Deputy Clerk

EXHIBIT 15

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed Jul 11, 2001]

No. C 01-0895 MJJ

TIMOTHY GIBLER,

Petitioner,

v.

LARRY G. MASSANARI, Acting Commissioner
of the Social Security Administration

Respondent.

ORDER DENYING RESPONDENT'S MOTION
TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION

INTRODUCTION

Before the Court is Respondent Larry G. Massanari's,[1] Acting Commissioner of the Social Security Administration ("the Acting Commissioner"), motion to dismiss Petitioner Timothy Gibler's ("Gibler") petition for a writ of mandamus for lack of subject matter Jjurisdiction. Having considered the moving papers and the arguments of counsel at the hearing on this matter, and for the reasons set forth below, the Court DENIES the'Acting Commissioner's motion to dismiss.

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[1] Larry G. Massanari became the Acting Commissioner of Social Security on January 20, 2001. He was therefore substituted for former Acting Commissioner.William Halter, the original respondent in this suit, pursuant to Federal Rule of Civil Procedure 25(d)(1).

Although Petitioner has failed to exhaust administrative remedies, this Court has jurisdiction because Gibler has raised a colorable Constitutional claim of Due Process violation.

FACTUAL BACKGROUND

Gibler received social security benefits under Title II of the Social Security Act (hereinafter "the Act") from on or about 1979 until December, 2000; because of a severe psychiatric disorder. Since 1979, he has undergone several continuing disability reviews performed by doctors contracted by the state agency to determine if he is still disabled within the meaning of am Act. On January 15, 2000, Gibler filled out a form entitled "Report of Work Activity-Continuing Disability," where he reported sporadic paid work activity involving singing for church choirs. On July 26, 2000, the Social Security Administration ("SSA") provided Gibler with a Notice of Proposed Decision to inform him. that his reported work could affect his benefits and that he had ten days in which to ' provide more information before a final decision and Notice of Termination. Gibler contends, and the Acting Commissioner does not dispute, that Gibler's medical record was not taken into account in making this determination. In December, 2000, Gibler did not receive a social security check, and his attorney filed a Request for Reconsideration even though no Notice of Termination had been issued. At that time Gibler requested that he be kept on check status pending appeal, but was not.

Gibler, through his attorney, contacted staff in multiple departments of the SSA during January and February, 2001, and requested that he remain on check status and have a medical examination to evaluate his continuing disability, but neither was forthcoming. On February 13, 2001, Gibler received a notice informing him that he no longer qualified for social security benefits because of his work, and that he was not entitled to payment retroactive to March, 1988. This letter also informed Gibler of his right to appeal the decision

within 60 days and/or file a new application. Gibler's challenge to this decision was denied at the reconsideration level on March 23, 2001, and he has requested an Administrative Law Judge ("ALJ") hearing to appeal the decision. In April 2001, Gibler requested that he be reinstated to check status pursuant to the Ticket to Work and Work Incentives Improvement Act of 1999 (hereinafter "Ticket to Work Act"), 42 U.S.C. § 1320b-19, and its expedited reinstatement provisions included in 42 U.S.C. 423(I). He was deemed ineligible for expedited reinstatement because his request did not come within 60 months of termination (because his benefits were terminated retroactively to 1988), and because the provision was not in effect at the time his benefits were terminated. See Resp.'s Motion to Dismiss Ex. 3. According to operating instructions distributed to SSA workers on December 29, 2001, the expedited reinstatement provisions of the Ticket to Work Act went into effect January 1, 2001 and apply to former Title II and Title XVI beneficiaries who had their benefits terminated based on work and file a request for reinstatement within 60 months of termination. *See* Pet. for Writ of Mandamus, Ex. 3.

Gibler has since filed a new application for benefits which has been tentatively approved by the SSA since February 2001, and his request for a hearing with an AU is pending while the SSA consolidates his claims files. Since the termination of his benefits, Gibler has been taken off Medicare and is unable to continue seeing his treating psychiatrist. He has sought treatment at county facilities to ward off psychiatric decompensation.

Gibler seeks a writ of mandamus from this Court ordering a medical termination review to determine his eligibility for benefits as well as reinstatement to check status pending appeal. He contends that this Court has subject matter jurisdiction pursuant to 8 U.S.C. § 1329 (jurisdiction over all

causes arising under Title II of the Social. Security Act),[2] 28 U.S.C. § 1361 (jurisdiction to compel an officer of the United states to perform a duty owed to the petitioner) and 28 U.S.C. § 1331 (federal question jurisdiction). The Acting Commissioner has moved to dismiss the petition for a writ of mandamus under Federal Rule of Civil Procedure 12(b)(l) for lack of subject matter jurisdiction, arguing that Gibler has failed to exhaust available administrative remedies within the SSA as required by 28 U.S.C. § 1361 and that he has not raised a colorable Constitutional Due Process claim to invoke jurisdiction under 28 U.S.C. § 1331.

LEGAL STANDARD

A motion brought under Federal Rule of Civil Procedure 12(b)(I) seeks dismissal of the plaintiff s complaint for lack of subject matter jurisdiction. "Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court." *St. Clair v. City Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Because federal courts are presumptively without jurisdiction in civil matters, the burden of proving the Court's authority to consider a case rests on the party asserting jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of America*, 114 S. Ct. 1673, 1675 (1994).

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[2] 8 U.S.C. § 1329 states in pertinent part that: "The district courts of the United States shall have jurisdiction of all causes, civil and criminal, brought by the United States that arise under the provisions of this subchapter. . . . Nothing in this section shall be construed as providing jurisdiction for suits against the United States or its agencies or officers." Under its express terms, 8 U.S.C. § 1329 is not a valid basis for jurisdiction in a claim against the Acting Commissioner of the Social Security Administration, and will not be discussed further.

ANALYSIS

A. Failure to Exhaust Administrative Procedure and Waiver for Jurisdiction under 28 U.S.C. 1361

Under 42 U.S.C. § 405(g), the Act provides the sole jurisdictional basis for judicial review of administrative actions concerning benefits claims, and judicial review is available only where the Commissioner has issued a *final decision* after a hearing to which claimant is a party. *Schweiker v. Chilicky*, 487 U.S. 412, 424 (1988) (emphasis added); *see also* 42 U.S.C. 405(g). Therefore, a court generally does not have jurisdiction when a claimant has failed to exhaust the administrative procedures set forth in the Act. *Bass v. Social Security Administration*, 872 F.2d 832, 833 (9th Cir. 1989). Further, a writ of mandamus is intended to provide a remedy for a petitioner "only if he has exhausted all other avenues of relief, and only if the respondent owes him a clear nondiscretionary duty." *Laurie Q. v. Callahan*, 973 F. Supp. 925, 933 (N.D. Cal. 1997) (quoting *Heckler v. Ringer*, 466 U.S. 602, 616 (1984)). Here, the Court holds that Gibler has not exhausted all administrative remedies and has not met the requirements for a waiver of the exhaustion requirement.

1. Failure to Exhaust

Gibler has not exhausted all administrative remedies within the SSA for his challenge of the cessation of his benefits in December, 2000 based on work, or for his demand for reinstatement of benefits. According to a letter from Gibler's attorney to this Court dated April 3, 2001, this case was not filed pursuant to Procedural Rule 16-1(e) after a final decision by the SSA, but was instead .fled as a writ of mandamus before final administrative action based on Constitutional and other grounds.

Although Gibler has initiated a request for a hearing before an ALJ to challenge the cessation of benefits in December,

2000, this request is pending while the SSA consolidates his claims and there has been no final decision on this issue. *See Bash*, 872 F.2d at 833 (holding that a decision is not the final decision of the Secretary until after a decision by the appeals council following a hearing before an ALJ. Additionally, Gibler has not yet challenged the denial of reinstatement based on the SSA's interpretation of the expedited reinstatement provisions of the Ticket to Work Act within the SSA's appeal framework.[3] Thus, Gibler has not exhausted all available agency procedures. *See Sims v. Apfel*, 530 U.S.103, 108 (2000) (finding that without a final decision, a claimant cannot obtain judicial review because he has failed to exhaust administrative remedies). Because he has not met the exhaustion requirement, it is unnecessary for this Court to reach the issue of whether the Acting Commissioner owed Gibler a clear, nondiscretionary duty to take his medical disability into account when discontinuing benefits and to continue the payment of benefits during appeal.

2. Waiver of the Exhaustion Requirement

In some cases, courts may waive the exhaustion requirement and assert jurisdiction because "cases may arise where a claimant's interest in having a particular issue resolved is so great that deference to the agency's judgement is inappropriate." *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976)). Judicial waiver of the exhaustion requirement is proper only if the claim at issue is: "(1) collateral to' a substantive claim

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[3] The Acting Commissioner concedes that "it is not clear at this juncture whether a viable administrative remedy concerning the denial of expedited reinstatement is available." Resp.'s Motion to Dismiss 6:16-17. However, it appears to the Court that the denial of the expedited reinstatement request is an initial determination subject to further administrative review. *See* 20 C.F.R. § 404.902(b) (stating that initial determinations are determinations-made subject to administrative and judicial review and include determinations about reentitlement to benefits).

of entitlement (collaterality), (2) colorable in its showing that refusal of the relief sought will cause an injury which retroactive payments can not remedy (irreparability),[4] and (3) one whose resolution would not serve the purposes of exhaustion (futility)." *Briggs*, 886 F.2d at 1139 (quoting *Bass*, 872 F.2d at 833); *see also Mathews*, 424 U.S. at 330-31; *Bowen v. City of New York*, 476 U.S. 467, 483 (1986); *Cassim*, 824 F.2d at 795. Gibler contends that he has met the three-part test for judicial waiver of the exhaustion requirement, so jurisdiction should be exercised even if he has not exhausted all available administrative remedies. However, the Court cannot waive the exhaustion requirement because Gibler's claim is not wholly collateral to his underlying claim for benefits, and exhaustion of administrative remedies would not be futile.

a. Collaterality

In order to be collateral to a substantive claim of entitlement, Gibler's request for an order that the SSA reinstate him to check status and perform a medical evaluation must not be "inextricably intertwined" with his claim for social security benefits. *Hironymous v. Bowen*, 800 F.2d 888, 894 (9th Cir. 1986). In *Hironymous*, the petitioner sought to overturn an SSA determination of ineligibility based on his adjusted resources. *Id.* The court found that "although granting a writ would not result in an award of benefits, it would remove from the Secretary's consideration a substantive factor immediately relevant" to the underlying claim. *Id.* However, in *Briggs*, 886 F.2d at 1139-40, it was determined that the

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[4] The Ninth Circuit, in *Cassim*, appears to have initially interpreted this factor of the exhaustion waiver under a "colorable Constitutional challenge" standard. 824 F.2d at 795. However, when the court later used the three-part test in *Briggs v. Sullivan*, 886 F.2d 1132, 1139 (9th Cir. 1989), it interpreted the second factor under an "irreparability" standard as apparently contemplated by the Supreme Court in *Mathews* and followed by courts thereafter.

plaintiffs' complaint, regarding suspension of social security payments when their representatives could no longer serve the role, was wholly collateral to the claimants' substantive benefits eligibility claim. The court reasoned that, because all plaintiffs in the action were already deemed entitled to benefits and the question remaining was to whom the benefits should be paid, this issue was collateral to the Secretary's eligibility criteria. *Id.* Thus, the case was not a claim of "substantive eligibility for benefits." *Id.*

Here, Gibler has been tentatively approved for benefits status as of February, 2001, and does not have a claim of eligibility pending with the SSA. Instead, he is challenging the SSA determination that he was ineligible for benefits from March, 1988 to February, 2001, and believes that medical evidence should have been taken into account in making that determination. However, granting a writ reinstating Gibler to check status pending appeal would remove from consideration at the administrative level whether or not he was eligible for expedited reinstatement of benefits under the Ticket to Work Act. Likewise, granting a writ ordering a medical examination to determine if cessation was proper as of 1988 would also interfere with an agency determination of Gibler's underlying claim. The Court finds that, although his request for reinstatement and a medical examination is not inextricably intertwined with a current claim for benefits, it is so closely related to his claim of substantive eligibility for benefits from March, 1988 to February, 2001 that it is not "wholly collateral."

b. Irreparability

"A colorable showing of irreparable injury for the purposes of waiver of the exhaustion requirement is one that is not 'wholly insubstantial, immaterial, or frivolous.'" *Briggs*, 886 F.2d at 1140 (holding that a showing that denial of payment would result in months without food or shelter meets "a far higher standard than colorable"). Here, Carol Banyas, Gib-

ler's primary treating psychiatrist, stated that "there is a substantial risk of decompensation during this time due to the fact that he no longer has Medicare. His ability to function on a day to day basis is at considerable risk . . . . It is clear that he has a severe psychotic disorder and is in urgent need of psychiatric treatment." Banyas Decl. ¶ 5. Additionally, Gibler's attorney stated in a letter to John Larimore dated December 20, 2000 that his client was about to become homeless and had no money for rent or food. Pet. for Writ of Mandamus Ex. 2. From these statements, the Court finds that Gibler will likely suffer irreparable harm if social security benefits continue to be denied.

c. Futility

Finally, this Court must determine whether Gibler's claim is one whose resolution "would not serve the purposes of exhaustion." *Briggs*, 886 F.2d at 1139. In *Briggs*, the court found that futility is satisfied where the claimant demonstrates that "there [i]s nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise." *Id.* at 1140 (quoting *Cassim*, 824 F.2d at 795). Because of the dispute regarding the interpretation and administration of the new Ticket to Work Act and its expedited reinstatement provisions, this case would certainly benefit from agency expertise. Additionally, the SSA has an interest in making initial interpretations of the new provisions through agency procedures and a hearing with an ALJ. The futility requirement is therefore not met.

Here, Gibler has not exhausted his administrative remedies within the SSA because he has a request for a hearing before an ALJ currently pending. Additionally, he has not met the three-part test for an exception to the exhaustion requirement because his claim is not collateral to a substantive claim of eligibility for benefits and exhaustion would not be futile. Thus, the Court cannot exercise mandamus jurisdiction over this claim pursuant to 28 U.S.C. § 1361.

B. Constitutional Claims of Due Process Violation for Jurisdiction under 281 J.S.C. § 1331

A colorable Constitutional claim of Due Process violation is an exception to the jurisdictional limitations of the Act. *See Udd v. Massanari*, 245 F.3d 1096, 1098-99 (9th Cir. 2001); *Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997) (finding that "the exception applies to any colorable constitutional claim of due process violation that implicates a right either to a meaningful opportunity to be heard or to seek reconsideration of an adverse benefits determination"). The fundamental requisite of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). A challenge that is not "wholly insubstantial, immaterial, or frivolous" raises a colorable Constitutional claim. *Boettcher v. Secret of Health and Human Services*, 759 F.2d 719, 722 (9th Cir. 1985).

Gibler alludes to several possible Constitutional Due Process violations in his Petition for Writ of Mandamus and in his Reply to Respondent's Motion to Dismiss. First, he contends that the Notice of Termination dated February 20, 2001 violates Due Process and the Social Security Act and regulations because it did not take into account his medical impairments to determine if he was capable of engaging in substantial gainful activity. Second, Gibler contends that Due Process is further violated because the procedures in place for contesting the SSA's determination of ineligibility through an All hearing, as applied to him, do not comport with Due Process because they force him to risk psychiatric decompensation pending review. Third, Gibler states that Due Process has been violated because the three notices he received are unconstitutionally vague. At oral argument, Gibler also introduced the possibility that Due Process was violated when the SSA failed to reinstate him to benefits status pursuant to the Ticket to work Act. Based on the entire record and arguments presented during oral argument, the

Court finds that Gibler's challenge of the timing of his ALJ hearing in light of his potential decompensation is the only colorable Due Process claim sufficient to afford this Court jurisdiction.

1. Notices Unconstitutionally Vague

The Court finds no merit in the contention that the notices Gibler received, retroactively cutting off his benefits, are unconstitutionally vague because they do not state that medical evidence was used in the determinations and do not state whether Gibler was terminated because of employment or self-employment. The notices state when and why Gibler was terminated, as well as information on how to appeal and file a new application. Therefore, they provide an opportunity to be heard in a meaningful time and in a meaningful manner; the essence of Due Process. *Boettcher*, 759 F.2d at 723 (citing *Mathews*, 424 U.S. at 333). Additionally, before receiving these notices Gibler received a Notice of Proposed Decision dated July 27, 2000, in which the information the SSA considered in making the adverse determination is listed in detail. Thus, Gibler could adequately challenge the adverse determination based on the entirety of the information provided by the SSA. His allegation of vague notices is not a colorable Due Process claim.

2. Review of Medical Evidence before Termination

In order to make a colorable claim that the review of medical evidence prior to termination of Title II benefits is Constitutionally required, Gibler would need to allege that a failure to take such evidence into account is so unreasonable that it affords him no process at all. *See Patel v. Penman*, 103 F.3d 868, 874 (9th Ch.. 1996) (quoting *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir.1988) (holding that "to establish a violation of substantive due process, a plaintiff is ordinarily required to prove that a challenged government action was 'clearly arbitrary and unreasonable, having no substantial

relation to the public health, safety, morals, or general welfare.'")). Gibler, however, simply argues that the Act and its regulations require the SSA to take medical evidence into account, and that failure to do so amounts to a Due Process violation. This argument fails to frame a colorable claim of Due Process violation. Instead it raises the issue of whether or not current SSA regulations required medical evidence to be taken into account before termination of his benefits, and requires an analysis of current SSA regulations and their applicability in his case. Therefore, his claim should be resolved by an ALI and not by this Court.

Gibler asserts that the decision to terminate his benefits without a medical evaluation is a Due Process violation because it does not follow Social Security Regulations ("SSRs") currently in place. He relies on *Han v. Bowen*, 882 F.2d 1453 (9th Cir. 1989) to demonstrate that SSRs interpreting the Act or its regulations are binding on the SSA, including ALJs. Gibler cites SSR 82-66 "Establishing a Cessation-Date in a Continuing Disability Claim" and SSR 83-34 "Determining Whether work is Substantial Gainful Activity," among others, to show that the SSRs were violated by the termination of Gibler's benefits and the lack of medical review. Gibler cites *Barker v. Secretary of Health and Human Services*, 882 F.2d 1474 (9th Cir. 1989); where the court held that the ability to perform sheltered work activity does not establish an ability to engage in substantial gainful work. He also relies on *Lopez v. Heckler*, 713 F.2d 1432, 1434 (9th Cir.1983), which states that "before Social Security disability benefits can be terminated on the ground that the recipient is no longer disabled, the Secretary must introduce evidence that the recipient's medical condition has improved."

However, whether or not medical information should have been taken into account in Gibler's case, based on current SSRs, is a factual argument that can and should be made first

in front of an ALJ The Acting Commissioner contends that Gibler's benefits were not terminated because of a change in continuing disability that would allow him to perform substantial gainful activity, but because he completed a "trial work period" of more than nine months.[5] *See generally* 20 C.F.R. § 404.1592. Thus, the SSRs and cases cited by Gibler do not appear to apply to his case. 20 C.F.R. § 404.1592(a) states that "the trial work period is a period during which you may test your ability to work and still be considered disabled. . . . During this period you may perform 'services' . . . [A]fter the trial work period has ended we will consider the work you did during the trial work period in determining whether your disability ended at any time after the trial work period." 20 C.F.R. § 404.1592(b) goes on to define services as "any activity (whether legal or illegal), *even though it is not substantial gainful activity*, which is done in employment or self-employment for pay or profit." (emphasis added). While the SSA might need to take medical information into account in determining whether a claimant has performed substantial gainful activity, Gibler's argument that the SSA is bound by the same standard in this case appears to be incorrect because a trial work period need not include substantial gainful activity.

Because Gibler has failed to frame a colorable Due Process claim stemming from the denial of a medical evaluation prior to termination of benefits, but instead raises a factual question regarding the applicability and interpretation of specific

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[5] Gibler has provided the Court with an earnings record reflecting the amount he earned during the months from September 1983 to July 2000, including those found by the SSA to be a "trial work period." Although the Court notes the varied amounts of Gibler's earnings, the issue of whether Gibler has completed a "trial work period" based on these earnings is not before this Court and should be presented to an ALJ as part of a challenge to the determination of ineligibility.

portions of the Act and its regulations, there is no basis for the Court to assert jurisdiction over this claim.

3. Reinstatement Pursuant to the Ticket to Work Act

"Gibler also appears to contend that the SSA's failure to reinstate him to benefits status pursuant to the Ticket to Work Act and its expedited reinstatement provisions, or to afford him an avenue for appeal from a denial of reinstatement, constitutes a Due Process violation. However, such allegations have not been stated as colorable Constitutional Due Process claims. In his petition, Gibler requests that the Court issue a writ ordering the SSA to "immediately reinstate Petitioner to check status retroactive to the month of termination," but does not specifically premise his prayer for relief on the Ticket to Work Act or a violation of that statute. Pet. for Writ of Mandamus 2:25-3:1.

At oral argument, Gibler maintained that the Congressional purposes stated in the Ticket to work Act, including the purpose "[t]o provide individuals with disabilities the option of maintaining medicare coverage while working," are binding on ALJs. 42 U.S.C. § 1320b-19(b)(3). However, assuming arguendo that this purpose is binding on ALJs, he has failed to allege any violation of this purpose amounting to a Due Process claim. At most, he has alleged that the SSA improperly denied his claim for reinstatement under the new provisions of the act based on a discrepancy between the date of notice of termination and the retroactive date of termination.

Additionally, Gibler contends that there is no clear avenue for appeal from an adverse determination of reinstatement under the Ticket to work Act, and so the Court should assert jurisdiction over an appeal of a decision. In his papers and at oral argument, the Acting Commissioner has conceded that it is unclear What the proper process for appeal of a denial of reinstatement under the new provision is at this time because final regulations have not been promulgated.

In *Laurie Q.*, 973 P. Supp. at 928, the court was faced with a similar question when asked to assert jurisdiction over a claim relating to a recent amendment of the Act. The plaintiffs, a class of special needs foster children, challenged the propriety of the. SSA designating the county as their representative payee, and asserted that a recent amendment to the Act did not contain a "presentment" requirement mandating that they present their claim to the Commissioner before taking it to federal court. *Id.* at 929. However, the court found that unclear statutory language and legislative history as well as strong policy considerations and existing regulations required a finding that a presentment requirement existed. *Id.* at 930-31. The court rationalized that first presenting claims to the Commissioner allows the Commissioner to consider whether original designations were in error and relief should have been granted, and prevents future claimants from circumventing the administrative process without giving the Commissioner an opportunity to correct the problem. *Id.* at 931. Because it was a case of first impression, and "because the subject matter jurisdiction of the federal courts is limited in cases involving the Act," the court d , termined that "the more prudent course of action here is to require plaintiffs to first seek relief before the Commissioner." *Id.* at 930-31. Similarly, here prudence requires that the SSA be given an opportunity to finalize the appeal process for adverse determinations stemming from the Ticket to work Act before this Court asserts jurisdiction over such claims. Because no claim of Due Process violation has been stated with respect to the Ticket to work Act and because the new provisions would be best interpreted initially by the SSA, the Court has no jurisdiction over any claims relating to that statute.

4. Length of Time to Obtain an ALJ Hearing

The Court notes that the fundamental requisite of due process of law is an opportunity to be heard at a meaningful

time and in a meaningful manner, *Goldberg*, 397 U.S. at 267, and that a Due Process challenge that is not "wholly insubstantial, immaterial, or frivolous" raises a colorable Constitutional claim. *Boettcher*, 759 F.2d at 722. With this in mind, the Court finds Gibler's strongest Due Process argument to be his contention that "it is a violation of due process for petitioner to risk psychiatric decompensation pending final administrative review," Petits Reply to Resp.'s Opp. 4:4-5. Although Gibler did not specifically pray for. relief from this violation in his petition, he does raise at least a colorable constitutional claim that, as applied to him in light of his disability and the length of time it will take for him to obtain an ALJ hearing, current procedures for challenging an SSA determination through an ALT hearing do not comport with Due Process because they do not afford him a meaningful opportunity to be heard.

In support of this Due Process claim, Gibler states that he is not receiving benefits pending appeal, is "about to become homeless," and cannot receive treatment from his treating psychiatrist for a serious mental condition, thus risking psychiatric decompensation. Additionally, his former treating psychiatrist has stated, It is my professional opinion that there is a substantial increased risk of decompensation during this tirihe due to the fact that he no longer has Medicare. His ability to function on a day to day basis is at considerable risk." Banyas Decl. ¶ 5. The Court also notes Gibler's allegation that in 2000 it took an average of 274 days to obtain an ALLhearing through the SSA's appeal procedure. *See* Pet.'s Request to Take Judicial Notice. Finally, the Court finds relevant that at oral argument, the SSA recognized that under normal operating procedures it may take up to two years for Gibler to begin receiving benefits under his new petition, which was tentatively approved in February 2001.

Gibler cites *Goldberg v. Kelly*, 397 U.S. 254 (1970), where the Supreme Court addressed an attack on the constitu-

tionality of New York's federally assisted program of Aid to Families and Dependent Children ("AFDC"). In *Goldberg*, appellees alleged that the State of New York terminated their AFDC benefits without prior notice and a hearing, thereby depriving them of due process of law. *Id.* at 260. Although the local procedure for termination of benefits afforded recipients notice of the reasons for termination and an opportunity to respond in writing, they were not provided with an evidentiary hearing and a right to appear prior to termination of benefits. The state's procedure did allow for a post termination "fair hearing" at which recipients could appear. *Id.* at 259.

The issue before the Supreme Court in *Goldberg* was "whether the Due Process Clause requires that a recipient be afforded an evidentiary hearing before termination of benefits." *Id.* at 260. The district court held the combination of post-termination review and informal pre-termination review was inadequate to dispose of Plaintiff's Due Process claim. *Id.* The Supreme Court agreed and held that AFDC benefits were a matter of statutory entitlement and, as such, these benefits could not be terminated without notice and an opportunity to be heard. *Id.* at 263-64. Next, the Court determined what process was due petitioners. In reaching this decision, the Court balanced the competing interests, both private and governmental, and found that Petitioner's private interest in securing benefits that were "the very means by which [the recipient] live[d]" outweighed the governmental interests in conserving fiscal and administrative resources. *Id.* at 264-66. Significantly, the Court did not attempt to quantify the exact formal prerequisites for the pre-termination proceeding. The Court noted that the fundamental requisite of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner, which, in the termination of benefits context, at a minimum required an opportunity to confront and cross-examine an "adverse witness" and to be present. *Id.* at 268-70.

The Supreme Court addressed similar issues in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 536 (1985), where a plaintiff challenged an Ohio statute that allowed the termination of civil service employees upon a showing of good cause. Employees so terminated were afforded administrative review after the discharge decision, but Loudermill alleged that the statute was unconstitutional on its face because it didn't provide civil service employees an opportunity to respond prior to removal. *Id.* Additionally, Loudermill asserted that the statute was unconstitutional as applied to him because employees were not given a sufficiently prompt post-removal hearing. *Id.*

The Supreme Court reversed the district court's dismissal of the plaintiff's action, finding that the Ohio Statute created a property interest and that Due Process required an opportunity to be heard prior to removal. *Loudermill*, 470 U.S. at 542-43. In reaching its conclusion, the Supreme Court balanced Loudermill's private interest in retaining employment versus the Government's interest in the expeditious removal of unsatisfactory employees and .the avoidance of administrative burdens. *Id.* at 544. Ultimately the Court held that the private interest involved outweighed the asserted Government interests. As such, a pre-removal hearing was required under the Due Process Clause where the Commission's decision infringed a protectable property interest. *Id.*

Significantly, the Supreme Court rejected Loudermill's second claim, that the post-deprivation administrative proceedings were not sufficiently prompt and therefore violated Due Process. *Loudermill*, 470 U.S. at 547. The Court concluded that Loudermill's claim revealed nothing about the nature of the delay and "offered no indication that his wait was unreasonably prolonged other than the fact that it took nine. months" and thus was not a claim onconstitutional deprivation. *Id.; see also Cassim*, 824 F.2d at 798 (quoting *Loudermill*, 470 U.S. at 547) (holding that doctor plaintiff

was entitled to a "prompt post-deprivation hearing" after termination from the Medicare program, but that he had not shown that he would not receive such a hearing). However, the *Loudermill* Court relied on its decision in *Barry v. Barchi*, 443 U.S. 55, 66 (1979), for the assertion that "at some point, a delay in post-termination hearing *would* become a constitutional violation," *Loudermill*, 470 U.S. at 547 (emphasis added).

Barchi involved a claim that New York's statute allowing for the suspension of a horse trainer's license, without a pre-suspension hearing, violated Due Process. 443 U.S. at 55. The statute indulged a presumption of negligence on the part of a licensed horse trainer, in the event that post race testing revealed the presence of drugs in a horse's system. *Id.* at 64. The Court held that Barchi was not entitled to a pre-suspension hearing under the Due Process Clause because the State was required to establish probable cause prior to a license suspension. *Id.* However, the Court found that Due Process required a "prompt post suspension hearing, one that would proceed and be concluded without appreciable delay." *Id.* at 66. The Court reached its conclusion because the record reflected that the provision for an administrative hearing, as set forth in the statute, failed to assure a prompt proceeding and prompt disposition of the outstanding issues between Barchi and the state. *Id.* Insofar as the statutory requirements were concerned, the Court stated that "it is as likely as not that Barchi and others subject to relatively brief suspensions would have no opportunity to put the State to its proof until they have suffered the full penalty imposed." *Id.* Because the statute as applied to Barchi was deficient in this respect, his suspension was found to be constitutionally infirm under the Due Process Clause of the Fourteenth Amendment.

Gibler's claim does not fall neatly within the parameters of *Goldberg*, *Loudermill*, or *Barchi*. However, in light of these Supreme Court decisions, the Court finds that Gibler has

raised at least a colorable Constitutional claim that, as applied to him, current procedures for contesting an adverse SSA determination through an ALJ do not comport with Due Process. First, the Supreme Court's acknowledgment in *Loudermill* that "[alt some point, a delay in the post-termination hearing.would become a constitutional violation," opens the door to such a claim. 470 U.S. at 547. Even though the *Loudermill* Court found that no unconstitutional delay had been pled in that case, the Court addressed the issue, stating that "the allegation of a distinct due process violation in the administrative delay is not an alternative theory supporting the same relief, but a separate claim altogether." *Id.* at n.12. As such, it appears that Plaintiff can allege a violation of Due Process as applied to him, where the period of delay is unreasonable and there is no adequate justification for the delay.

Additionally, the *Goldberg* Court expressed concern regarding the termination of benefits that impact an individual's ability to survive while he waits for a hearing, and required a pre-termination hearing under the Due Process Clause before such action could be taken. 397 U.S. at 266. Here, although disability benefits under the Act are arguably different from welfare benefits, the Court finds that Gibler has made at least a colorable claim that in his case termination of Medicare benefits and thus treatment by his treating psychiatrist similarly impact his ability to live while he waits for an ALJ hearing.

Finally, in *Barchi*, 443 U.S. at 66, the Supreme Court held that Due Process required a prompt post-suspension hearing, "one that would proceed and be concluded without appreciable delay," because the provision for an administrative hearing, as set forth in the statute, failed to assure a prompt proceeding and disposition of the outstanding issues between the plaintiff and the State. Significantly, while Barchi had no Due Process right to a pre-suspension hearing, the Supreme Court held that the failure to afford him a prompt post-

suspension proceeding and disposition of issues infringed his Due Process rights. Arguably, Gibler's situation is like that of the Petitioner in *Barchi*. Gibler's benefits have been terminated and aside from his right to appeal the termination within 60 days thereof, his opportunity for a fuller treatment of the issues before the ALJ is approximately a year away.[6]

Because this order addresses a motion to dismiss for lack of subject matter jurisdiction, the 'Court does not reach the issue of whether the SSA's scheme for review is unconstitutional as applied to Gibler or not. However, the Court finds that based upon Gibler's arguments in his papers and at oral argument, he seeks a determination of whether the provisions of the SSA and regulations allowing review of termination of benefits are so unreasonably delayed as to constitute a violation of Due Process in his case. In this regard, Gibler need only allege a "colorable showing" of a Constitutional violation to afford this Court jurisdiction of his claim. Based upon the foregoing, it appears Gibler has a colorable Constitutional claim over which this Court has subject matter jurisdiction.

CONCLUSION

The Court finds that Gibler has failed to exhaust administrative remedies within the SSA and has not met the requirements for a waiver of the exhaustion requirement that would allow this Court to assert mandamus jurisdiction. Howēver, for the reasons set forth above, the Court finds that Gibler has made a colorable Constitutional claim that the procedures currently in place for challenging an adverse SSA

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[6] *See* Pet.'s Request to Take Judicial Notice. Additionally, the Court notes that although the SSA has approved Gibler's new application for benefits, at oral argument the SSA conceded that benefits under this new application might not be forthcoming for approximately two years. In the meantime, the SSA apparently does not provide a stipend for psychiatric treatment or medicine.

determination, as applied to him, constitute a Due Process violation. Accordingly, the Court DENIES the Acting Commissioner's motion to' dismiss for lack of subject matter jurisdiction.

IT IS SO ORDERED.

Dated: 7/11/2001

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

EXHIBIT 16

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION NO. C 03-0823 MJJ

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TIMOTHY GIBLER,

Plaintiff,

vs.

JO ANNE B.BARNHART, COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION

Defendant.

SECOND AMENDED COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF, SOCIAL SECURITY BENEFITS, AND SANCTIONS; JURY DEMAND
[PER COURT ORDER]

I

PRELIMINARY ALLEGATIONS

The above-named Plaintiff makes the following representations to this Court for the purpose of obtaining judicial review of continuing actions and decisions of defendant ("the Agency") adverse to the Plaintiff:

1. This Court has jurisdiction pursuant to 42 U.S.C. Section 405(g), 42 U.S.C. Section 1383(c) (hereinafter "the Act") and the Fifth Amendment to the U.S. Constitution.

2. Plaintiff is a resident of San Francisco, California.

3. The Agency is the duly-appointed official of the Social Security Administration, and at all tunes here mentioned was exercising its duties as such.

4. Plaintiff has been disabled within the meaning of the Social Security Act since 1978 the year The Agency found him disabled due tip a severe psychiatric disability, Chronic Schizophrenia and Agoraphobia.

5. There are no adequate administrative remedies for the conduct of the Agency described herein. Administrative Law Judges and the Agency's Appeals Council do not have jurisdiction to adjudicate ay constitutional issues the

6. Plaintiffs was informed that there was a secret list indicating that he should not have been ceased as his name was not on the list. (*See* Declaration of Timothy Gibler filed with the Complaint and First Amended Complaint.)

7. On February 14.2003 by an amendment to decision dated August 30, 2001 The Agency's Appeals Council denied Plaintiff's request to revise the Decision of the ALJ dated August 30, 2001 With respect to re-

characterizing Plaintiff's work from sheltered to non sheltered.

8. By (Order dated August 23, 2003 this Court dismissed the First Amended Complaint without prejudice so as to require more specific pacts in support of "colorable due process claims" and gave Plaintiff to days to amend the complaint. In its Order of June 17, 2003 this Court requested clarification of what issues are not resolved by "Gibler I" by the doctrine of collateral estoppel by failure to exhaust administrative remedies, by being collateral to a substantive claim of entitlement and there being no purpose in exhaustion (futility.)

9. Plaintiff has been reinstated retroactively to his social security and medicare benefits with the exception of a three year period, 1988-1991 which falls within an exception to the exhaustion requirement.

10. Plaintiffs Opening Brief (Appellant's) Opening Brief District Court No. 0895 MJJ (JL) in the U.S. Court of Appeals case of *Gibler v. Barnhart* is filed concurrently herewith Any and all facts contained therein are hereby incorporated by reference.

II

LACK OF BENEFITS PENDING APPEAL VIOLATES THE FIFTH AMENDMENT

All allegations of I. PRELIMINARY ALLEGATIONS are hereby incorporated by reference.

1. Plaintiff has been reinstated retroactively to his social security and medicare benefits with the exception of a three year period, 1988-1991 which fills within an exception to the exhaustion requirement and which nevertheless also met the exhaustion requirement.

2. Plaintiff alleges that the Agency's policies and procedures regarding "work reviews" violate the Fifth amendment as described in further detail herein and are continuing.

3. The three years period (1988-1991) issue is in the District Court alter a timely Request For Review by the Agency's Appeals Council which was denied February 14, 2003.

4. All Fifth Amendment violations have and will cause irreparable harm. Plaintiff has undergone approximately five or six cessation reviews and the agency may initiate another at any time thrusting Mr. Gibler back on food stamps, Medicare and similar irreparable harm.

5. Plaintiff alleges that a (secret) list has been unlawfully used to terminate him in the fall of 2000 (*See* Declaration of Mr. Gibber dated May 6, 2003, filed with this Court.)

6. Futility would result in any Fifth Amendment issue such as those raised herein because, in part, administrative appeals cannot ac1fudicate constitutional issues.

7. Plaintiff alleges that the secret list is unpublished and unlawful and; therefore, justifies waiving the exhaustion requirements, if any in that the 60 day time period to appeal is a statute of limitations and is not jurisdictional for any or all issues raised in this Complaint.

8. The exhaustion requirement was satisfied as to the years from 1988-1991.

III

ADMINISTRATIVE FINALITY AND RES JUDICATA AS TO A 1987 FINDING

[FIFTH AMENDMENT VIOLATION]

All allegations of I PRELIMINARY ALLEGATIONS and II LACK OF BENEFITS PENDING APPEAL VIOLATES THE FIFTH AMENDMENT are hereby incorporated by reference.

1. SSA conducted a "Work Review" of Plaintiff on or about May 1987 and concluded that Plaintiff was doing "sheltered employee work" as a singer, the same kind of work he has done since 1978.

2. The Agency initiated another "'Work Review" of Plaintiff in January 2000 and intentionally ignored relevant medical evidence that Plaintiff was doing "non sheltered" employee work" as a Singer and was no longer disabled within the meaning of the Act since-on or about 1988 causing irreparable in that he no longer could Provide for the basic necessities of life.

3. The Agency misrepresented to this Court including on June 17, 2001 that Plaintiff completed his nine month Trial Work Period (TWP) in 1981 by implying that TWP's require medical evidence. Trial Work Periods never require medical evidence. This Court in its Order or July 11, 2001 appears to have been misled. *See* Order 10:20-23.

4. The Agency concealed a finding of the characterization of his work in 1987 as "sheltered work" which cannot he used against a social security beneficiary for cessation.

5. The Agency revered itself and found in its final decision that Gibler worked only sporadically anti with "subsidies" (20 CFR 404.1574) continuously through the date of the ALJ decision. The period from 1988-1991 is a separate basis for this appeal.

6. The Agency Made these findings based on medical evidence in its ALJ decision.

IV

VAGUE NOTICES RELATING BACK THIRTEEN YEARS ARE IN VIOLATION OF THE FIFTH AMENDMENT.

All allegation of I through III, above are hereby incorporated by reference.

1. This Court in " GIBLER I" declined to adjudicate the issue of whether a cessation notice retroactive for thirteen years is violative of Plaintiff's due process rights based on the amount of time and resulting prejudice (memory) as evidenced in the ALJ Decision dated August 30, 2001 wherein the ALJ found that he could not give Plaintiff a re entitlement between 1988 and 1991 because Plaintiff's memory, or lack thereof, of details relating to the terms of his work; i.e. subsides and sporadic nature.

2. The 10 day notice: does not have an objective basis for appeal, is not "reasonably calculated under all the circumstances" to apprise Plaintiff of what he can or should due to keep his benefits pending appeall. *See* 10 day Notice Attached hereto as Exhibit I.

The ten day notice (a) does not state whether he was an employee or self employed, (b) that SSA did they did not consider any medical evidence, (c) that it contradicts the prior determination of the only other "work review" done in May 1987

3. The Agency during its cessation review never informed Gibler that this prior determination was made. The doctrine of *Res Judicata* applies to the 1987 determination.

4. Gibler is performing the same kind of work as he was doing since 1978.

5. The notice does not state: (a) how he could object, (b) where he could object and (c) the basic notice requirement that he had sixty days to appeal if he did not agree the stated reason for his termination. There is no reason to believe that this 10 day notice could have been reasonably calculated to afford an individual of his right to present objections.

Paragraph 2 of the Notice states:

> "We are writing this letter to give you a chance to give us more information that you want us to consider . . ."

6. The Agency definitions of self-employment which require a minimum or hours of services a week and/or work comparable to others in the same work could not apply to the list on the notice because it is a list of employers and does not relate to self-employment. The first paragraph on page 2 of the notice states:

"There was no evidence to indicate that you did not fully earn the salary you were paid."

7. The ALJ decision which is now is the final decision of the Agency uses (a) "subsidies" and (b) "sporadic" work activity . . . (c) subtractions from gross earnings which are known as subsidies. IRWEs (Impairment Related Work Expenses) are also permitted to he subtracted. Sporadic work" is a legal concept that is not mentioned much less explained in the notice. It cannot be assumed that a reasonable person of average intelligence would know that the Agency had made a Finding of "sheltered work" since an Agency "report of contact" form done by a claim's representative in a San Francisco Social Security office was never provided to Plaintiff.

8. Plaintiff as with any other reasonable person cannot be required to remember details from thirteen (13) years prior to keep benefits.

9. The ALJ Decision did not adjudicate the issue of whether of how Plaintiff's work as a Singer had been recharacterized as "sheltered work" to "non sheltered work."

10. On October 28, 2002 Plaintiff requested that ALJ to "Reopen and Revise" his Hearing Decision with an adjudication relating to the change from sheltered to non sheltered work.

11. By letter dated October 30, 2002, the ALJ denied Plaintiff request to reopen and revise his August 30. 2002 decision; but reopened the decision and went on to amend his decision by an addendum offering an explanation, thereby making new and different findings that Plaintiff' is now and has been since 1987 "self employed" in a trade or business, because of self employment Income.

By letter dated February 14, 2003 SSA made it final decision by denying a Request for Review at the Appeals Council.

V.

SSA IGNORED MEDICAI EVIDENCE IN VIOLATION OF ITS OWN RULES AND THE DUE PROCESS CLAUSE.

All allegations contained in I through IV are hereby incorporated by reference.

1. The Agency has the burden of proof in a social security cessation case and that a treating physician's opinion must be given great weight unless the Agency can articulate specific and legitimate reasons for not accepting it.

2. Plaintiff was and would again upon another review be reduced to food stamps, Medicare and the basic necessities of life.

3. During the cessation review itself, The Agency was aware that Plaintiff was an in-patient in the psychiatric ward

of California Pacific Medical Center for approximately ten days and was on a powerful anti-psychotic medication upon discharge failed to take his medical condition into account or consult and that his treating psychiatrist. The discharge summary was in the Agency's cessation claims file and therefore; the Agency was on notice or Plaintiff's medical condition with respect to his life and death situation.

4. The Agency had a legal duty to obtain all medical evidence via the State Agency and conduct a medical CDR. This duty was breached.

VI.

BAD FAITH OF THE AGENCY IN PRECLUDING DUE PROCESS AND [SANCTIONABLE CONDUCT]

1. The Agency terminated Plaintiff from his Social Security checks and Medicare based on an unlawful secret list still not known to the public or Plaintiff.

2. The Agency-misled this Court into believing that an ALJ had authority to cause checks and Medicare to be expedited and by omitting the fact the Agency's payment center in Baltimore has jurisdiction over check issuance not the ALJ.

3. The Agency intentionally and maliciously told this Court that the only remedy in was to advance an ALJ hearing rather than to utilize the pre ALJ administrative procedures for constitutional hearings already in place for approximately two decades. The Agency terminated Plaintiff's benefits prior to a due process hearing, instead of after, resulting in this Court's counting days from the date Plaintiff's benefits were ceased, on or about October, 2000, in order to determine if there is a due process violation if Plaintiff decompensated which he already was in the process of doing.

4. The Agency did not permit a Continuing Disability Review (CDR) at the California State Agency. SSA had treat-

ing sources' opinions that Plaintiff was unable to work, ignored the opinions, and closed and sent the file to Baltimore.

5. The Agency upon reconsidered determination issued a non-medical affirmation from Baltimore. By doing the reconsideration in Baltimore the Agency prevented a required medical review.

6. During the time of no benefits. Plaintiff was reduced to food stamps, at risk for losing his home without medical treatment forcing him to go through the county medical procedures and get Temporary Authorization Requests (TAR) for his medications, and to borrow money to pay rent.

Plaintiff's anxiety increased and he had suicidal ideation necessitating Increased medication. Plaintiff suffered increased anxiety and panic attacks due to the termination, and continues to he damaged by the exacerbation of his disability.

7. The Agency was on notice that these life threatening events were likely to occur.

VII

DEMAND FOR JURY

Plaintiff Timothy Gibler through his attorney hereby demands a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure. The issues for which Plaintiff demands a trial by jury consist of the following:

1. Whether or not The Agency violated Plaintiff's rights to procedural due process under the ~~clue~~ process elapse of the Fifth Amendment by not affording him benefits pending appeal after a cessation determination was made on or about February, 2001.

2. Whether or not Plaintiff was denied procedural due process by the Agency acting in bad faith by re-characterizing prior work evidence from sheltered work activity to non

sheltered work activity, and using this against Plaintiff in violation of the due process clause of the Fifth Amendment.

3. Whether or not the Agency violated Plaintiff's right to substantive due process by the Agency either knowing nor should have known the tact that Plaintiff was unable to work based oil an exacerbation of his disability of over 20 years duration, which took place (luring a cessation disability review; specifically, that he was in a lock-up psychiatric ward during the review.

4. Whether a list unknown to the public was unlawfully applied to the Agency.

5. Whether or not Plaintiff's procedural due process rights under the due process clause of the Fifth Amendment were violated by not sending him a timely due process notice, informing him of his right to appeal within 60 days, and why his benefits were, being terminated: specifically, whether he was engaged as an "employee" or "self-employed" to give Plaintiff a meaningful opportunity to contest the characterization of his work and other facts such as "subsidies" and medical evidence.

6. Whether or not Plaintiff vas denied his right to procedural due process under the due process clause of the Filth Amendment by the Agency ignoring its own rules, regulations and policies regarding the State Agency of California reviewing medical evidence once a treating physician states he is unable to work (SGA).

7. Whether or not Plaintiff's right to procedural due process under the due process clause of the Fifth Amendment has been violated by the Agency not permitting Plaintiff to have a "*Goldberg v. Kelly*" due process hearing prior to cessation.

8. Whether or not Plaintiff was denied his rights to procedural due process as guaranteed under the due process clause of the Fifth Amendment by bad faith conduct on the

part of the Agency prior to the litigation as described above and/or during the litigation, in representations made to the District Court regarding an exhaustion of administrative remedies, that all ALJ could expedite the issuance of checks and medicare *and* that no medical evidence needed to be considered in the cessation.

WHEREFORE, Plaintiff seeks:

1. A restoration or his Social Security Benefits to what it would have been but for the violations alleged herein.

2. A determination that The Agency violated Plaintiff's Fifth Amendment right to due process by recharacterizing the same work from sheltered to non sheltered and then to self employed without any new evidence in support of said finding.

3. A determination that The Agency may not ignore medical evidence of Plaintiff as described herein.

4. A determination that Plaintiff has a constitutional and statutory right to benefits pending appeal.

5. A determination that The Agency has been covering up had faith conduct including a list, pre ALJ constitutional hearings, that ALJ cannot Order expedited checks and that their rules require consideration of medical evidence to find "Substantial Gainful Activity."

6. Monetary Sanctions

7. An Order enjoining SSA from continuing the unlawful conduct described herein.

8. A determination that retroactively ceasing Plaintiff thirteen years violates the Due Process Clause.

9. Costs-and attorney's fees;

10. Such other relief as the Court deems just and proper.

Dated: 8/28/03

/s/ Steven Bruce
STEVEN BRUCE,
Attorney for Plaintiff

EXHIBIT 17

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	CLAIM FOR
Timothy Gibler (Claimant)	Period of Disability and Disability Insurance Benefits
_____ (WageEarner)	343-48-5666 (Social Security Number)

This case is before the Administrative Law Judge on a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUES

The primary issues in this case are whether the claimant's disability ceased as of January 1988 because he was engaging in substantial gainful activity after completion of a trial work period, and whether his entitlement to Disability Insurance Benefits ended as of March 1988. If the claimant's disability ceased in January 1988 (or at any other time) due to his work activity, related issues include whether the claimant subsequently became disabled again (and therefore entitled to a new period of disability), whether he was overpaid during any period of time due to a loss of entitlement, and if so, whether recovery of such overpayment may be waived.

The claimant's representative has requested that additional issues be included, such as the date of onset established for a new application for disability benefits filed in 2001, and whether the provisions of the recent "Ticket to Work" program should be used to re-instate the claimant's entitlement

to Medicare and/or his monthly benefits (Exhibits 48, 56, 57 and 60). In conjunction with that request, the representative also asked that additional medical records (in the possession of various Social Security Administration components) be subpoenaed. However, the decision in this case will result in a favorable resolution of all issues without the necessity of obtaining additional evidence or addressing new issues.

PROCEDURAL HISTORY

The claimant (Timothy Gibler) filed an application fort disability insurance benefits under Title II of the Social Security Act in January 1979, and he was found to be disabled since August 31, 1978 due to chronic schizophrenia that met the criteria of Listing 12.03 (Exhibits 1 and 2).

Several continuing disability reviews have been undertaken since the claimant became entitled to benefits, but it has always been determined that there had been no improvement in his psychiatric condition (Exhibits 3-6 and 49-51).

However, the claimant had been able to obtain sporadic employment as a singer since 1979 in spite of his continued psychiatric symptoms, and in July 2000 the Social Security Administration notified the claimant that he had completed a 9-month trial work period by June 1981. The Administration further notified the claimant that he had been engaging in substantial gainful activity (SGA) as of January 1988, and that his entitlement to benefits had therefore ended as of March 1988. That determination was upheld on February 28, 2001, after reconsideration, and a timely request for hearing was filed on March 19, 2001. (Exhibits 8, 9, 12 and 13)

After due notice, a hearing was held on August 27, 2001 in San Francisco, California at which the claimant personally appeared and testified. Mr. Gibler was represented by Steven Bruce, an attorney.

EVALUATION OF THE EVIDENCE

Evidence of record includes numerous reports made by the claimant in conjunction with the periodic continuing disability reviews undertaken by the Social Security Administration, during which Mr. Gibler acknowledged his ongoing but erratic work activity (Exhibits 16, 24, 27). Evidence of record also includes verification of the claimant's earned income that was developed by the Administration at various points in time, by direct contact with employers or through records of earnings maintained by the Social Security Administration (Exhibits 30, 32 and 43). A detailed summary of the monthly earnings derived by this developmental process may be found at Exhibits 8 and 31.

Once disability has been established under Title II of the Social Security Act, all subsequent work activity must be evaluated to determine whether a trial work period has been completed, and whether the claimant has subsequently engaged in substantial gainful activity. A 9-month trial work period permits a claimant to test his ability to work with no risk to his benefits. Prior to 1990, a trial work period month was represented by earnings of at least $75 (or 15 hours of work in self employment); as of 1990, a trial work period month is $200 (or 40 hours of work in self employment). A trial work period may not begin until the month of entitlement to disability. (20 CFR 404.1592)

Once a trial work period is completed, subsequent work activity must be evaluated in terms of whether it represents the ability to engage in substantial gainful activity, and if so, whether disability should cease as a result of that work activity (20 CFR 404.1594(f)(g)). As defined in the regulations, substantial gainful activity is work activity that involves doing significant physical or mental activities, and is the kind of work usually done for pay or profit, whether or not a profit is actually realized. A conclusion is generally made that an individual is engaged in substantial gainful

activity if monthly earnings average more than $740 a month since January 2001, or more than $700 a month from July 1999 through December 2000, or more than $500 per month from January 1990 through June 1999, or more than $300 a month prior to 1990. (20 C.F.R. 404.1571 et seq.)

In addition, factors such as whether an individual is employed in a sheltered or special environment, or may not be earning the amounts he or she is paid (20 C.F.R. 404.1574), or whether the work ended after a short period of time due to the impairment (20 CFR 404.1574), or whether the severity of the individual's impairment or impairments requires that he or she purchase or rent certain items and services in order to work (20 C.F.R. 404.1576), may be used to rebut the assumption that the amount of earnings represents substantial gainful activity.

A self-employed individual is engaging in substantial gainful activity if his or her work activity, in terms of such factors as hours, skills, energy, output, efficiency, duties, and responsibilities, is comparable to that of unimpaired individuals in the community engaged in the same or similar business as their means of livelihood; or if the work activity, although not so comparable, is clearly worth at least the applicable monetary SGA amount in terms of its value to the business or when compared to the salary that an owner would pay an employee to do the work; or if the individual renders services that are significant to the operation of the business and receives a substantial income from the business (20 C.F.R. 404.1575)

The first substantive analysis of the claimant's work activity occurred in May 1987, at which time the Social Security Administration determined that the claimant had completed a 9-month trial work period, but that his ongoing work activity did not represent SGA (Exhibits 51 and 52).

The next substantive analysis did not take place until July 2000, at which time the Administration determined that the

claimant had engaged in SGA in January 1988, that his disability should have ceased as of that date, and that he had therefore not been entitled to benefits after March 1988 (Exhibits 7-9 and 11-12).

An individual is also eligible for Title II benefits within a 36 month re-entitlement period and extended period of eligibility (which begins the month following the end of the trial work period), during which time the claimant may receive benefits for any month in which he is not engaging in substantial gainful activity. The first month in which an individual is again engaged in substantial gainful activity is considered his benefit termination month, that is, the month in which benefits can no longer be paid regardless of whether substantial gainful activity continues (20 CFR 404.321(c)).

In this case, the Administration noted that the 36-month extended period of eligibility (EPE) had ended in July 1981. Since it was determined that the claimant was engaging in SGA in January 1988 (long after the end of the EPE), he could not be re-entitled to benefits for any month after March 1988 in which he was not engaging in SGA (Exhibits 7 and 8). Benefits were suspended as of November 2000, but the Administration determined that the claimant *had* been overpaid for all benefits received (approximately $88,000) after March 1988.

The only evidence that the Social Security Administration was able to obtain for 1988 (the year in which disability was determined to have ceased) was the record of earnings maintained by the Administration, which is transmitted to the Social Security Administration from the Internal Revenue Service after tax records are submitted each year. The claimant's earnings record revealed that he had reported $8,279 in self employment earnings for 1988, along with $12,693 in self employment earnings in 1990 and $4,689 for 1991 (Exhibit 43). Mr. Gibler was unable to provide any information about that self employment income (such as what

type of work he was doing or when he actually did the work), he was unable to provide tax records for those years, and he was even unable to remember performing or reporting self employment work activity in those years (Exhibits 29 and 33). The claimant was likewise unable to provide additional information about this work during the administrative hearing, even though several suggestions were made prior to the hearing as to how he might be able to obtain such information, and why it could be important in evaluating his work during that period of time (Exhibit 53).

The self employment income established by the claimant's earnings record appears (on the surface) to be an aberration, both in terms of the type of income and the amount earned. Prior to 1988, the claimant worked very sporadically as a singer in a local church choir (Exhibits 16, 24 and 27). He was paid as an employee, and his income fluctuated wildly, but he rarely earned enough in any month to be at an SGA level (Exhibits 8 and 31), and none of the work was determined by the Administration to represent SGA (Exhibit 52). The claimant has continued to work as a singer since 1988, and he has continued to be paid as an employee. The amount of wages likewise continued to fluctuate after 1988, but were consistently below SGA levels through at least the first half of 1998 (Exhibits 28-30).

It seems unlikely that the claimant would be able to earn such significantly higher amounts of money in 1988 and 1990, especially under an entirely different set of circumstances (as a self employed individual). The radical departure from his work pattern before and after the period at issue suggests that some of the special considerations described above may have been involved, or that the income may even have been erroneously reported under his Social Security Number.

However, Regulations at 20 CFR 404.803 state that after the statutory time limit (3 years, 3 months and 15 days after the end of a tax year), earnings records are conclusive evidence

of the amount of self employment income in a particular year (unless an exception in 404.822 applies). Since no exceptions apply, and since it is impossible to determine whether special considerations existed in 1988 and 1990 that could reduce the value of self employment earnings reflected on the claimant's earnings record for those years, the amount of such earnings must be accepted at face value.

Self employment income (SEI) must be averaged for an entire year (20 CFR 404.1575). The claimant's average monthly SEI in 1988 was $690, which was considerably higher than the SGA level in effect at that time ($300 per month prior to 1990). Similarly, the average monthly SEI during 1990 was $1,057, which was much higher than the SGA level in effect as of 1990 ($500 per month).

It is therefore found that the claimant had completed a 9-month trial work period by 1981, and that his average monthly self employment income represented substantial gainful activity during 1988 and 1990. The claimant thus demonstrated the ability to engage in substantial gainful activity in spite of his ongoing psychiatric problems, and his disability therefore ceased because of work activity as of January 1988. The claimant was no longer entitled to benefits after March 1988, the 2nd month following the month in which disability ceased (20 CFR 404.321).

However, it is also found that the claimant became entitled to a new period of disability once he was no longer engaging in SGA. The last period during which the claimant's income represented SGA was in 1990. His average self employment income in 1991 was less than $400 per month (Exhibit 43), well below the SGA level of $500. From 1991 through the 1st half of 1998, the claimant's wages were likewise consistently below $500 per month (Exhibits 30 and 31). His wages exceeded $500 in 8 months during that period of time, but the claimant explained that he was never able to earn money at that level for more than a few weeks at a time

before his psychiatric symptoms would become worse (Exhibits 28 and 29). Those sporadic increases in earnings are therefore considered unsuccessful work attempts, and not SGA.

Between September 1998 and the end of 1999, there were 9 months in which the claimant's wages exceeded the SGA level, and several of those months were more than double the applicable SGA level (Exhibits 8, 30 and 31). However, evidence of record establishes that those sporadic peaks in wages were caused by the claimant's work for two employers in those months, the Archdiocese of San Francisco and the Philharmonia Baroque Orchestra (Exhibits 28, 30 and 31). Moreover, the bulk of the income in those months was derived from the Philharmonia Baroque Orchestra (Exhibit 30/page 7).

At the hearing, and in documentary records, the claimant explained that most of his work since 1990 has been with the Archdiocese of San Francisco. Mr. Gibler stated that he began singing for the church choir as a volunteer, since he had a music background before he became unable to work. The claimant testified that the Director of Music (John Renke) was an old friend, and that Mr. Renke was able to arrange for the claimant to be the only paid member of the choir. The claimant stated that Mr. Renke is well aware of the claimant's psychiatric problems, and that Mr. Renke permits the claimant to skip and/or leave rehearsals or church services when his symptoms are acute. The claimant stated that Mr. Renke talked to the treating psychiatrist and learned that singing in the choir is a useful part of the treatment process, since it is the claimant's only social activity (Exhibit 62). Mr. Gibler explained that he has had panic attacks on several occasions during rehearsals or services, and that Mr. Renke has also given him extra break time to see if medication will ease the symptoms enough to continue. The claimant stated that the choir sings in a loft that cannot be seen by the

congregation, so he has a better chance of participating without having a panic attack. (Testimony and Exhibits 28, 29)

The claimant further testified that he was invited to audition for the Philharmonia Baroque Orchestra (PBO) by a person who had heard him sing at the church. Mr. Gibler was under a contract that required him to sing in no more three concerts a year. Rehearsals were infrequent, perhaps 5 times for each performance, and he was required to rehearse no more than a couple hours at a time. The PBO was not aware of the claimant's psychiatric problems, so no special considerations were given to him. However, the claimant stated that his symptoms were much more acute when he was required to rehearse or perform for the PBO, since the circumstances were not as comfortable as in the church, and since he had to take public transportation for longer periods of time, and to locations he had difficulty finding. For these reasons, the claimant was unable to continue working for the PBO. (Testimony and Exhibit 28).

It is therefore found that the additional months of work activity that were in excess of SGA levels during 1998 and 1999 were also unsuccessful work attempts, and therefore not SGA.

Since the claimant has not engaged in SGA since the end of 1990, it must next be determined whether a new period of disability may be established, and if so, as of what date of onset. In that regard, it is noted that the Social Security Administration has evaluated the claimant's medical condition on several occasions since he was found to be disabled in 1979. On every occasion, the Administration has determined that there had been no improvement in his condition, and that he continued to be disabled due to a severe psychiatric impairment (Exhibits 3-5 and 49-51). Moreover, the claimant filed a new application for disability benefits

after his benefits were suspended at the end of 2000, and he was again found to be disabled (although the onset date was appealed).

Medical evidence likewise establishes that the claimant has at all times been unable to perform any type of work on a sustained basis because of his psychiatric symptoms. Reports from treating and examining sources, along with treatment notes, have consistently revealed evidence since 1981 of severe psychiatric symptoms that preclude sustained work activity (Exhibits 37, 38, 40, 42, 61 and 63). Such medical evidence is also consistent with the claimant's extremely sporadic work pattern, which confirms an inability to sustain such activity for more than very brief periods of time.

Accordingly, it is found that the claimant has been disabled since the first month after his disability ceased in which he was no longer engaging in substantial gainful activity (January 1991). Since the claimant became disabled again within 5 years of the date disability ceased, he is not required to serve a 5-month waiting period (20 CFR 404.315), so he has been continuously entitled to benefits since January 1991 (the beginning of a new period of disability). The claimant has likewise been entitled to Medicare benefits since the beginning of the new period of disability (42 CFR 406.12).

It is also found that the claimant was still overpaid as a result of this modified cessation decision. However, the amount of the overpayment will be much smaller since the claimant was not entitled to benefits for a much shorter period of time (April 1988 through December 1990). The Social Security Administration will need to recalculate the overpayment when this decision is effectuated.

It is further found that recovery of the remaining overpayment (regardless of the amount) may be waived. The claimant always reported his work activity to the Social Security Administration at the time continuing disability reviews were

undertaken (Exhibits 16, 17, 24-27, and 29). The Administration made a substantive determination regarding the claimant's work activity in May 1987 (Exhibit 51), but did not do so again until July 2000 (Exhibit 7), even though the claimant had reported ongoing work activity at least in 1995 and 1996 (Exhibits 24-26). The claimant cannot be found "at fault" in connection with an overpayment that could have been avoided (or at least significantly reduced) by more timely action by the Social Security Administration.

Moreover, the claimant's only income at this time is the still small amount of wages and food stamps, which are insufficient to cover his ordinary living expenses (Exhibit 64). Both requirements for waiver are therefore met, and recovery of the overpayment is waived.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant was originally found to be disabled as of August 31, 1978.
2. The claimant completed a 9-month trial work period by June 1981.
3. The claimant was engaging in substantial gainful activity (SGA) in January 1988.
4. The claimant's disability ceased as of January 1988 due to his demonstrated ability to engage in SGA.
5. The claimant has once again been "disabled," within the meaning of the Social Security Act, since January 1, 1991 due to chronic schizophrenia that precludes him from performing any type of work activity on a sustained basis.
6. The claimant was overpaid because he was not entitled to the Title II benefits paid to him from April 1988 through December 1990.

7. The claimant was "without fault" in connection with the overpayment.

8. Recovery of the overpayment would defeat the purpose of Title II of the Act.

9. Recovery of the overpayment is waived.

DECISION

It is the decision of the Administrative Law Judge that the claimant completed a 9-month trial work period in 1981, that his disability ceased as of January 1988 due to his demonstrated ability to engage in substantial gainful activity, and that he was not entitled to benefits under Title II of the Act as of April 1988.

It is the further decision of the Administrative Law Judge that the claimant has been "disabled" under Title II of the Act since January 1, 1991 and through the date of this decision, and that he has been entitled to both monthly benefits and Medicare at all times since January 1991.

The Social Security Administration shall, in the course of effectuating this decision, recalculate the amount of overpayment that was made during the period April 1988 through December 1990. It is the further decision of the Administrative Law Judge that the claimant is "without fault" in connection with such overpayment; that recovery would defeat the purpose of Title II of the Act; and that recovery of the overpayment is therefore waived.

/s/ F. Neil Aschemeyer
F. NEIL ASCHEMEYER
Administrative Law Judge

Date: 30 Aug. 2001

LIST OF EXHIBITS

Claimant: Timothy Gibler SSN: 343-48-5666

Exh. No.	Part No.	Description	No. of Pages
1		Application for Disability Insurance Benefits filed 1/26/79	4
2		Initial Disability Determination and Transmittal dated 2/27/79	1
3		SSA Notice of Continuing Disability Review dated 4/8/96	2
4		Cessation or Continuance of Disability or Blindness Determination and Transmittal dated 6/4/96	2
5		SSA Notice dated 6/4/96	5
6		SSA Notice dated 4/20/00	2
7		Cessation or Continuance of Disability or Blindness Determination and Transmittal dated 7/27/00	2
8		SSA Notice of Proposed Decision dated 7/27/00	8
9		SSA Notice dated 2/08/01	3
10		Request for Reconsideration filed 6/25/01	2
11		Cessation or Continuance of Disability or Blindness Determination and Transmittal dated 2/28/01	1
12		SSA Notice of Reconsideration dated 3/23/01	3
13		Request for Hearing filed 3/19/01	1
14		Disability Report dated 1/26/79	8
15		Social Security Disabled Person Report dated 5/13/80	4
16		Social Security Disabled Person Report dated 7/8/91	4
17		Work Activity Report-Employee dated 1/26/79	4
18		Vocational Report dated 2/2/79	4
19		Vocational Report dated 5/13/80	3
20		Vocational Report undated	4
21		Statement of Employer dated 3/12/79	1
22		Daily Activities and Interests Questionnaire dated 7/8/81	2
23		Daily Activities and Interests Questionnaire dated 8/5/81	2
24		Report of Continuing Disability Interview dated 4/10/95	6
25		Daily Activities Questionnaire dated 5/13/96	6

26	Daily Activities Questionnaire (Third Party Information) dated 5/14/96	6
27	Work Activity Report-Employee dated 2/24/87	4
28	Report of Work Activity-Continuing Disability dated 1/15/00	4
29	Work Activity Report-Employee dated 4/27/00	3
30	Wage Information	14
31	Trial Work Period Tally Worksheet	2
32	Earnings Record dated 7/5/01	5
33	Report of Contact dated 7/26/00	1
34	Report of Contact dated 12/4/00	2
35	Letter dated 12/20/00 from atty	2
36	Appointment of Representative and Fee Agreement dated 3/19/01	2
37	Medical reports dated 2/26/79 and 6/30/80 by Gary L. Shepherd, M.D.	11
38	Psychiatric Consultative Evaluation dated 8/28/81 by M.B. Dunham, M.D.	5
39	Audiologic Consultative Evaluation dated 5/21/96 by Carl Croutch, M.S.	2
40	Psychological Consultative Examination dated 5/27/96 by Joanna Koulianos, Ph.D.	7
41	Medical record dated 2/18/00 from California Pacific Medical Center	3
42	Medical Assessment Of Ability To Do Work-Related Activities (Mental) dated 9/20/00 by Carol Banyas, M.D.	3
43	Detailed Earning Record dated July 19, 2001	4
44	Letter dated July 20, 2001 by Steven Bruce claimant's Attorney	2
45	Court Decision dated July 11, 2001	22
46	Letter dated July 20, 2001 by Steven Bruce, Claimants Attorney	1
47	Letter dated July 20, 2001 by Steven Bruce, Claimant's Attorney	1
48	Letter dated July 23, 2001 by Steven Bruce, Claimant's attorney	2
49	Cessation or Continuance of Disability Determination and Transmittal dated July 10, 1980 Showing Disability Continued by State Agency Physician	1

50	Cessation or Continuance of Disability Determination and Transmittal dated September 16, 1981 Showing Disability Continuing by State Agency Physician	1
51	Cessation or Continuance of Disability Determination and Transmittal dated May 2, 1987 Showing Disability Continues, Work no IRWE by State Agency Physician	1
52	Worksheet Showing Claimant's Work Activity/Extended Period of Disability by Claims Representative dated May 7, 1987	5
53	Letter dated August 6, 2001 to Steven Bruce, Attorney for Claimant, RE: Additional Information Needed/Case Issues	4
54	Letter to Claimant's Attorney Steven Bruce dated August 20, 2001	1
55	Transcript of Hearing Proceedings dated June 12, 2001 from the United States District Court Northern District of California.	28
56	Request for Statement of Your Decision Denying Claimant's Request for Due Process Documents dated August 2, 2001	7
57	Letter dated August 9, 2001 from Claimant's Attorney Steven Bruce	3
58	Letter dated August 10, 2001 from the Administrative Law Judge to the Claimant's Attorney Steven Bruce	3
59	Letter dated August 10, 2001 from the Administrative Law Judge to the Claimant's Attorney Steven Bruce	3
60	Pre Hearing Brief dated August 13, 2001 from claimant's Attorney Steven Bruce	7
61	Medical records covering the period February 2000 to March 2001 from California Pacific Medical Center (submitted by claimant's attorney, Steven Bruce)	
62	Letter, dated August 23, 2001 by John Renke, Director of Music for Shrine of St. Francis of Assisi	1

63	Letter, dated August 24, 2001 by claimant's attorney, Steven Bruce with attachment covering the period June 5, 2001 to June 26, 2001 from San Francisco General Hospital	9
64	Request for Waiver of Overpayment Recovery dated August 27, 2001 by the claimant, Timothy Gibler	8

EXHIBIT 18

[SEAL] SOCIAL SECURITY ADMNISTRATION

Refer To: Timothy Gibler
SSN 343-48-5666

Office of Hearings and Appeals
Social Security Administration
301 Howard Street 3rd Floor
San Francisco, California 94105
Tel: (415) 744-3080
Fax: (415) 744-2548

October 30, 2002

Steven Bruce
People With Disabilities Foundation
507 Polk Street, Mezzanine
San Francisco, CA 94102

Dear. Mr. Bruce:

Your request to reopen and revise the Hearing Decision dated August 30, 2001 is denied for the following reasons.

The determination made by the Social Security Administration in 1987 (that work activity prior to that date was sheltered work, and that it would not be considered substantial gainful activity) was in regard to work that was performed as an employee, and the Administration was able to obtain current and useful information from the claimant regarding the circumstances of that work. Moreover, the work was being evaluated primarily under trial work period guidelines, which do not require an assessment of special considerations such as sheltered work situations.

The second determination made by the Social Security Administration (in July 2000, not in 1990 as described in your letter) was in regard to work performed during 1988, 1990 and 1991. That work was reported as self employment income, and the claimant was unable to provide any information about the circumstances of that work. Thus, the determi-

nation made by the Administration in July 2000 was on an entirely different period of work activity, reported as a completely different type of work, and using a limited amount of information.

In such circumstances, it is highly likely that the Administration would make a different determination in regard to whether the work activity in 1988, 1990 and 1991 (as opposed to that performed prior to May 1987) represented substantial gainful activity. It is not fair to characterize the second determination as constituting "fraud or similar fault" on the part of the Social Security Administration, as contended in your letter.

It should also be noted that additional opportunities to provide substantive information (about the self employment work reported in 1988, 1990 and 1991) were provided in connection with the hearing process. Several possible avenues of investigation were suggested, but no new evidence was provided. It was therefore necessary to make a Hearing Decision on the basis of the same evidence that was available to the Social Security Administration in July 2000. For all these reasons, there is no basis to reopen that Hearing Decision.

Sincerely,

/s/ F. Neil Aschemeyer
F. NEIL ASCHEMEYER
Administrative Law Judge

EXHIBIT 19

Social Security Administration
939 Market St
San Francisco CA 94103

Office Hours: Monday-Friday
9:00 a.m. to 4:30 p.m.
Phone: (415) 744-5760
CDR

Date: 07/27/00
Claim Number: 343-48-5666 A

TIMOTHY GIBLER
730 OFARRELL ST.
APT. 17
SAN FRANCISCO CA 94109-7129

Dear Mr. Gibler:

We have information about your work and earnings that could affect your Social Security disability payments. Based on this information, it appears we will decide that your disability ended because of substantial work and that you are not entitled to payments beginning April 1988.

We are writing this letter to give you a chance to give us more information that you want us to consider. Please review the following information we are using to make our decision. You have 10 days to give us more information before we make our decision final. The 10 days start the day after you receive this letter. We assume that you got this letter 5 days after the date on it unless you show us that you did not get it within the 5-day-period. If you need more time, let us know right away.

THE INFORMATION WE HAVE

We are considering the following reports in evaluating your claim:

- Your-signed statement regarding work and earnings
- Social Security Administration earnings records

- Work information reported to us by your employer(s)
- PHONE CONTACTS WITH YOU

We are considering the following work in this decision:

WORK START	WORK END	EMPLOYER	JOB TITLE
01/97		Archdiocese of San Fran	Singer
09/98	04/00	Philharmonic Baroque Orc	Singer
08/95	04/98	St. Dominic's	Singer
12/91	11/95	Catholic Archdio-St Mary	Singer
01/88	12/88	Self Employed	Singer
01/90	12/91	Self Employed	Singer
11/95	11/85	San Fran Symphony	Singer
02/81	02/92	Grace Cathedral	Singer
01/79	05/79	Cathedral Ch-St Paul	Singer

There was no evidence to indicate that you had impairment related work expenses which might have affected this decision.

WHAT WE PLAN TO DO

Based on the-information we have, it appears we will decide that your disability ended because of substantial work as of January 1988. Please read the following information about what will happen to your payments if we make this decision.

WHAT HAPPENS WHEN A PERSON GOES TO WORK

Going to work does not affect payments right away. That's because a person is allowed a period of 9 trial work months to test his or her ability to work in spite of health problems.

A trial work month is any month in which a person earns more than:

$200 in gross wages or
$200 in net self-employment earnings or
40 hours of work in self-employment

Before 1990, a trial work month was any month in which a person earned more than $75 or worked more than 15 hours in self-employment.

Beginning 1992, the 9 months of work must take place in a 60-month period to end the trial work period. However, the 9 months do-not have to be in a row.

Our records show your trial work period ended June 1981 and that your nine months of trial work are:

February 1979
March 1979
April 1979
May 1979
February 1981
March 1981
April 1981
May 1981
June 1981

WHAT HAPPENS AFTER THE TRIAL WORK PERIOD

After the trial work period, several things happen.

Your disability ends if your work activity shows your ability to do substantial work. However, we pay benefits for the month disability ends and the following 2 months no matter how much .is earned. Based on the information we have, in your case, this is January 1988 through March 1988.

You get an extended period of eligibility that begins right after the trial work period. This is a 36 month period when we restart payments.

WHAT IS SUBSTANTIAL WORK?

Generally, substantial work is physical or mental work a person is paid to do. Work can be substantial even if it is part-time. To decide if a person's work is substantial, we consider the nature of the job duties, the skill and experience needed to do the job, and how much the person actually earns.

A person's work may be different than before his or her health problems began. It may not be as hard to do and the

pay may be less. However, we may still find that the work is substantial under our rules.

Usually, we find that work is substantial if gross earnings average over $700 a month after we deduct allowable amounts. This monthly amount was $500 before July 1999 and less than that before 1990.

INFORMATION ABOUT MEDICARE

If your health problems still meet our less, your Medicare will continue for at least 39 months after your trial work period.

IF WE DO NOT HEAR FROM YOU

If we do not hear from you within the next 10 days, we will make our decision based on the information we have now. The 10 days start the day after you receive this letter. We assume you got this letter 5 days after the date on it unless you show us that you did not get it within the 5-day period. When we make our decision, we will send you another letter.

IF YOU HAVE ANY QUESTIONS

If you have any questions, you-may call, write or visit any Social Security office. Our telephone number and address are shown above. We can answer most questions over the phone. If you visit an office, please take this notice with you. Also, if you plan to visit an office, you may call ahead to make an appointment. This will help us serve you more quickly.

Sincerely,

JOHN HANLEY
FIELD OFFICE MANAGER

PC-CDR NOTICE—FOLDER COPY

EXHIBIT 20

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CASE NO. 01-000895 MJJ

STEVEN BRUCE, ESQ., CBN 70300
People With Disabilities Foundation
507 Polk Street, Mezzanine
San Francisco, CA 94102

Telephone: (415) 931-3070 Fax (415) 931-2828
Attorneys for Petitioner

TIMOTHY GIBLER,
Petitioner,

VS.

LARRY G MASSANARI,
Acting Commissioner of the Social Security Administration
Respondent.

DECLARATION OF CAROL BANYAS , MD

1. I, Carol Banyas, MD have been Timothy Gibler's primarly treating psychiatrist since on or about February 2000 at which time he spent approximately ten days in California Pacific Medical Center's psychiatric ward. Since that time I have seen him in individual therapy and medication management on a monthly basis.

2. In addition to therapy I prescribe various medications including Zyprexa and Klonipin, Serzone in an effort to assist him in his maintenance of daily functioning.

3. His diagnosis is Psychotic NOS. His resulting fictional limitations are stated on the

1.) Psychotic Disorder Not otherwise specified

Consider Schizoaffective Disorder-Last phase depressed.

2.) Panic Disorder with agoraphobia

three page form I filled out at the request of his attorney, Steven Bruce.

4. Because he lost his Medicare benefits I cannot continue to treat him and have given him telephone numbers for county agencies to seek treatment.

5. It is my professional opinion that there is a substantial increased risk of decompensation during this time due to the fact that he no longer has Medicare. His ability to function on a day to day basis in his current situation is at considerable risk.

6. I have offered to continue to write his prescriptions for his medication but can do no more for him. It is clear that he has a severe psychotic disorder and is in urgent need of psychiatric treatment.

I, Carol Banyas declare under pity of penny that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in San Francisco, California this 11 day of May, 2001,

/s/ Carol Banyas, MD
CAROL BANYAS, MD

REPORT OF CONTACT
(Use ink or typewriter)

ACCOUNT NUMBER AND SYMBOL: 343-48-3666

TO: ☐ NE ☐ MAT ☐ SE ☐ GL ☐ WIN ☐ MAM ☐ ODO ☐ OIO ☐ DDS

NAME OF WAGE EARNER OR SE PERSON: Timothy J. Gibler

PERSON(S) CONTACTED AND ADDRESSES ☒ WE OR SE PERSON ☐ OTHER (Specify)

CONTACT MADE: ☐ DO ☐ BO ☐ CS ☐ HOME ☒ PHONE: ☐ OTHER

DATE OF CONTACT: 7/26/00

SUBJECT

Called claimant to discuss self employment work activity shown on DEQY for 1988, 1990 and 1991. He had indicated on the SSA-82 he completed on 4/27/00 that he had no idea where they came from. Outside of this SEI, he has had earnings under SSA or where over, they were unsuccessful work attempts. His SEI for 1988 + 1990 is, however, considered so I tried to get more information from him regarding this work. He has kept no tax returns. He did say that he did work for some other churches, all of which he can't remember but he did mention St. Jarlos(?). He would sing at funerals and weddings. Apparently this is what his SEI was but he has no recollection of declaring this on his TR. He is very nervous and excitable and is probably going to be here after getting the notice of proposed action. We will just average this SEI over the respective years.

SIGNATURE: Donald Worm

DISTRICT OFFICE *(Name, Address & Code)*: 950

☒ CR ☐ FR ☐ SR ☐ CLAIMS CLERICAL ☐ OTHER (Specify)

DATE OF REPORT: 7/26/00

PAGE 1 OF 1

Form SSA-5002 (8-81) EF (9-99)

*U.S. Government Printing Office: 2000 — 461-307/20157

EXHIBIT 33

EXHIBIT 21

PACIFIC
MEDICAL CENTER

PATIENT DISCHARGE INSTRUCTION SHEET

LEE TIMOTHY J M
A: CONNOR CHARLES P
PCP
DOB 07/20/1951
ADM 02/11/2000
PSYCHIATRY

	PRESCRIPTIONS:	COMMENTS:
DISCHARGE PRESCRIPTIONS	Zyprexa 5mg #1/2 Tab PO at nighttime	
	Paxil 20mg #1 PO daily	
	Klonopin 0.5mg #1 PO at night time and every 6 hr. PRN for	anxiety
	Depakote 250mg #1 Tab PO daily	

ACTIVITIES — NATURE OF ILLNESS: Depressed mood, difficulty concentrating with impaired memory and anxiety.

DIET — Regular.

TREATMENTS/WOUND CARE — EXPECTED COURSE OF RECOVERY:
c medication and f/u with outpatient psychiatry – much improvement.

DISCHARGE/HOME CARE — Home care / Discharge plans are:
medications and f/u with outpatient psychiatrist.

Additional home instructions (Pamphlets, Instruction Sheets, etc.):

Follow-up Appointment(s):

Date/Time	Name	Phone No.
2/29/00 @ 3:00PM	Dr. Baujas.	

☐ NURSE: Document patient's condition at time of discharge in Patient Progress Record.

Welfare and Institutions Code 5331—No person may be presumed to be incompetent because he or she has been evaluated or treated for mental disorder or chronic alcoholism, regardless of whether such evaluation was voluntarily or involuntarily received. Any person who leaves a public or private mental health facility following evaluation or treatment for mental disorder or chronic alcoholism, regardless of whether that evaluation or treatment was voluntarily or involuntarily received, shall be given a statement of California law as stated in this paragraph.

Be sure to call your doctor if anything unusual occurs, or for any questions you may have.

I certify that I understand these instructions and have received a copy thereof.

☐ I designate the following person(s) to receive a copy of these instructions:

NAME OF DESIGNATED PERSON(S)

EXHIBIT 12

SIGNATURE

☐ I decline to designate another person to receive a copy of this document.

X Timothy J. Gibler 2/18/00
PATIENT/OTHER SIGNATURE DATE

EXHIBIT

Call your doctor to arrange your next visit in ~~As req~~ days

Discharge date: 2/18/00 Time 11:45

☐ Admitting Notified of Discharge

Accompanied by: ☐ Friend ☐ Staff ☐ Relative ☒ Self

Mode: ☒ Ambulatory ☐ Wheelchair ☐ Gurney

Property and/or valuables with patient ☐ Yes ☒ None

[signature] RN 2/18/00
CAREGIVER SIGNATURE DATE

120a
EXHIBIT 22

EXHIBIT 23

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE
HONORABLE MARTIN J. JENKINS, JUDGE

NO. C 01-0895 MJJ
Tuesday, January 8, 2002
San Francisco, California

TIMOTHY GIBLER,
Plaintiff,

vs.

JOANNE BARNHART,
Commissioner of Social Security Administration,
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF: Steven Bruce Law Office
507 Polk Street, Suite 330
San Francisco, California 94102
By: Steven Bruce, Esquire

FOR DEFENDANT: David Shapiro
Acting United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102
By: Geralyn Gulseth, Social Security Administration

REPORTED BY: Diane E. Skillman,
Official Court Reporter

COMPUTERIZED TRANSCRIPTION BY ECLIPSE

* * * *

[4] LAWSUIT, COUNSEL?

MR. BRUCE: We asked for benefits pending the hearing by the administrative law judge.

THE COURT: What did my order say on that request?

MR. BRUCE: The order indicated—well, the order denied benefits pending, but also stated that the court did have jurisdiction based on the colorable claim of due process—of the violation of due process claim of the Fifth Amendment.

THE COURT: So what is the record pursuant to which I would grant a judgment in your favor on the due process issue that I found a colorable claim?

MR. BRUCE: Well, the reason the order—the order was a 17-page order, and specifically one question that the court asked both sides was medical evidence required, and the commissioner side said, no, which is a false and misleading statement.

THE COURT: Yes, but that's not relevant to the—it is not relevant to the jurisdictional basis upon which I retained the case because I retained this case on a very narrow proposition. And you know that. And that proposition—

MR. BRUCE: I do know that.

THE COURT: And I'm mindful of *Goldberg versus Kelly*. To take a look at what transpired on this record, and it seemed to me facially there was a colorable constitutional [5] claim to determine whether or hot the commissioner was conducting its review in a time frame that did not violate due process; no jurisdictional basis that addressed how much process was due; didn't speak to the merits of the determination made by the commissioner in the context of the

administrative proceeding. That's not what I granted jurisdiction with respect to the constitutional claim to hear.

So I have trouble—you can argue that—but I have trouble finding any basis on this record to enter any judgment. First off, I never took jurisdiction of the merits of the determination. So you could not get a judgment for that.

And I don't have any record, because we never heard evidence with respect to the time frames for hearing these matters to determine whether or not you have established that there is a due process violation. So I don't know how I would afford you a judgment on that basis.

MR. BRUCE: May I respond?

THE COURT: Sure.

MR. BRUCE: I believe that the issue your honor has phrased, the court did not take jurisdiction of the merits is precisely the issue that we're raising. The reason that the court didn't take jurisdiction of the merits was based on a false, several false and misleading representations by the commissioner; specifically that the remedy was not in this

* * * *

[12] MR. BRUCE: Yes.

THE COURT: How?

MR. BRUCE: There is some cross-reference on those. Had this court been informed by commissioner that the treating source rule requires that a CDR continuing disability be done by the state agency as opposed to being remedied by moving up an ALJ hearing, I don't believe that this court would have only found in the order on such a narrow basis.

THE COURT: It is all hypothetical. It's not what the action dealt with, based on my findings, and don't I have to use the existing record to make a determination as to who the prevailing party is under the existing cause law?

MR. BRUCE: Well, after—

THE COURT: Yes or no?

MR. BRUCE: If there's fraud, no. But in this case, it is yes and no.

The reason it is yes, because in the transcript your honor asked me if medical evidence was required. I said, yes. Your honor then turned to opposing counsel who was then the AUSA who said, no. And that was a false and misleading statement. A continuing disability review is required, it's not discretionary, and that answer was simply not true.

MS. GULSETH: First of all, again, there was no misrepresentation. This cessation was not based on a continuing disability review, it was based on earnings over [13] several years.

THE COURT: Yes.

MS. GULSETH: Second, even assuming there was some sort of misstatement by counsel, I don't see how that renders plaintiff the prevailing party for purposes of EAJA.

THE COURT: That's why I asked the question. I am not tracking with you. I understand your arguments with respect to the misrepresentation, but it is not consonant with any of the case law that I have seen with respect to how the court determines attorney's fees and the causal relationship between the litigation and ultimate outcome.

MR. BRUCE: Without being redundant, whenever there is a treating psychotherapist opinion, Ninth Circuit law—

THE COURT: I understand.

MR. BRUCE:—Requires a medical review. It is not discretionary. They said it wasn't and they're maintaining they weren't required, and I am saying that is not the law.

THE COURT: And I am saying that is a different case.

MR. BRUCE: That is what they are saying happened here.

THE COURT: That is not the case that got litigated before me.

You are arguing the effects of that, and then arguing from those effects and requesting attorney's fees in

* * * *

(2)

Supreme Court, U.S.
FILED
JUN 27 2005
OFFICE OF THE CLERK

No. 04-1357

IN THE

Supreme Court of the United States

TIMOTHY GIBLER,

Petitioner,

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR REHEARING

STEVEN BRUCE *
PEOPLE WITH DISABILITIES FOUNDATION
507 Polk Street, Second Floor
San Francisco, California 94102
(415) 931-3070

* Counsel of Record

Attorney for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF FACTS	2
III. REQUEST TO TAKE JUDICIAL NOTICE	3
IV. ARGUMENT	3-5
V. CONCLUSION	6
CERTIFICATION (RULE 44)	7
APPENDIX	B-i

TABLE OF AUTHORITIES

CASES	Page
Matthews v. Eldridge, 424 U.S. 319 (1976)	5
Schweiker v. Chilicky, 487 U.S. 412, 417 (1988)	3
UNITED STATES CODES	
42 U.S.C. § 421(m)(1)	2
42 U.S.C. § 423 (e)	3
42 U.S.C. § 423 (f)	3
42 U.S.C. § 423 (f), (g)	2
42 U.S.C. § 423 (f), (g) Pub. L. 98-460, §§ 2, 7, 98 Stat. 1794-1796, 1803-1804	3
42 U.S.C. § 423 (g)	3
42 U.S.C. § 423 (g)(2)	2
CONGRESSIONAL RECORDS	
130 Cong. Rec. 26000, 26145-26146 (1984); *see also id.*, at 6621; *id.*, at 13247	3

IN THE

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---

PETITION FOR REHEARING

I. INTRODUCTION

This case involves an individual, Timothy Gibler on social security disability benefits since 1979 due to chronic schizophrenia, who was retroactively terminated from benefit checks and Medicare resulting in a loss of the ability to provide for the ordinary necessities of life; e.g., food, rent, and clothing. His check benefits and Medicare were restored, in major part, by an Administrative Law Judge's decision. This Petition for Rehearing is not meant to reargue that which is in the Petition for a Writ of Certiorari denied on June 6, 2005.

II. STATEMENT OF FACTS

Congress made it clear that disability beneficiaries will receive benefits pending appeals of the Social Security Administration's termination reviews in the Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. § 423 (f), (g). These amendments came about because of numerous abuses. The reforms were intended to resolve constitutional due process issues so that anyone whether on Supplemental Security Income (Title XVI of the Social Security Act) or Social Security Insurance (Title II of the Social Security Act)[1] disability benefits could continue on benefits. Only those individuals on the Title II program after an Administrative Law Judge appeal decision could be charged with an overpayment of benefits if the final outcome was not in their favor. 42 U.S.C. § 423 (g) (2). Benefits paid Title XVI recipients are not counted as an overpayment if the outcome is not in their favor.

The Social Security Administration does not give beneficiaries check benefits and/or Medicare pending an appeal of an initial termination decision if they label the decision a work review as opposed to a medical review.

At the initial level the Social Security Administration has procedures in place to process reviews wherein an individual can receive benefits pending appeal by simply requesting them if the review is labeled a medical review. In this case where substantial psychiatric medical evidence[2] came to light in the review, the Social Security Administration, at the initial and reconsidered adjudication levels, refused to develop the medical evidence as it related to Petitioner's ability to work.[3]

---

[1] The program Petitioner Mr. Gibler is on.

[2] Petitioner was in a hospital psychiatric lock-up ward during this review. Petition for Writ of Certiorari, Appendix A, Ex. 20.

[3] Also see 42 U.S.C. § 421(m)(1) (December 17, 1999, effective January 1, 2001.)

III. REQUEST TO TAKE JUDICIAL NOTICE

Petitioner hereby requests this Court take judicial notice of facts referenced in Congress' Government Accountability Office Report No. 04-656 to Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives of July 2004, a public record. The source of virtually all the facts is the Social Security Administration. (Petition for Rehearing, Appendix B, Ex. 1.)

IV. ARGUMENT

42 U.S.C. 423 §§ (e) Engaging in substantial gainful activity . . . ., (f) Standard of review for termination of disability benefits . . . . ., and (g) Continued payment of disability benefits during appeal . . . must be read together when interpreting Congress's intent in providing for interim benefits pending appeal of a termination adjudication at the initial level. Pub. L. 98-460, §§ 2, 7, 98 Stat. 1794-1796, 1803-1804, 42 U.S.C. §§ 423(f), (g). "In its final form, this legislation was enacted without a single opposing vote in either Chamber. *See* 130 Cong. Rec. 26000, 26145-26146 (1984); see also *id.*, at 6621; *id.*, at 13247." *Schweiker vs. Chilicky*, 487 U. S. 412, 417 (1988). Thus, Congress drew the line in resolution of due process abuses at whether or not someone would be charged with an overpayment after appeal.

Mr. Gibler's Fifth Amendment violations as described in his Petition for a Writ of Certiorari occur when very low level agency representatives at local social security field offices terminate benefits while conducting so called "work" reviews. The abusive consequences of due process violations are of a degree of severity to justify this petition as evidenced by the Government Accountability Office (GAO) findings that the rules low level claims representatives use are not the same as the law and regulations used by the administrative

law judges.[4] According to the Social Security Administration's own records, 63% of all cases in 2003 were reversed by administrative law judges[5] and in 2003 it took on average 344 days to obtain a hearing.[6] An emergency Order to preserve the status quo and subsequent emergency Order on the merits in the United States Court of Appeals underscore the grave situation in which Mr. Gibler was placed by Respondent.[7]

In essence, the Government Accountability Office found that the Social Security Administration's progression eliminating these inconsistencies has resulted in the Government Accountability Office including federal disability programs on its list of "high risk government programs." The Social Security Administration has been unsuccessful in its partially implemented unification initiative.[8]

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[4] Government Accountability Office Report No. 04-656 to Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives. (July 2004). Appendix B, Petition for Rehearing, Ex. 1. The GAO's report reveals systemic differences in adjudication of claims at these two levels. GAO Report, pp. 11, 14, (Appendix B, Ex. 1, pp. 6a, 7a, 8a). Adjudicators follow only on an internal manual, Program Operations Manual System (POMS), whereas Administrative Law Judges rely on law and regulation. *Id.*, p. 14, 15. FN 18 (9a). The GAO finds the social security administration does not identify the areas of inconsistencies between these two adjudication levels. *Id.*, pp. 23-24 (12a, 13a). The Social Security Administration expressed concerns including that this GAO report did not fully discuss progress the agency achieved in reducing inconsistency between its adjudication levels. *Id.*, p. 34, *et seq.* (14a, 15a)

[5] *Id.*, p. 7 (5a)

[6] *Id.*, p. 12, FN. 14. (7a)

[7] Petition for Certiorari, Appendix A, Ex. 9.

[8] Social Security Administration's unification process began in 1994. GAO Report, pp.1-2, (Appendix B, Ex. 1, p. 3a)

Traditional notions of due process require continuing benefits when people lose the ability to provide for the necessities of life prior to a judicial hearing. [9]

This petition asks this Court to align the Social Security Administration's termination procedures so that a beneficiary's due process rights are not violated by a termination of benefits before a judicial due process hearing. Although the Social Security Administration interim benefits are afforded pending appeals of "medical" reviews, the Social Security Administration does not afford continuing benefits pending appeals of "work" reviews. Congress' passage of its 1984 reform measures have been abused by Respondent's practice of terminating essential benefits required for survival before a judicial due process hearing.

There are no medical professionals, attorneys or judges in or utilized by the field offices where social security "claims representatives" make initial adjudications to terminate an individual's sole means of support *before* having an opportunity for a judicial hearing. In the present case the Administrative Law Judge took medical evidence of disability into account in reversing the lower level adjudication, as any other administrative law judge should have done.[10] The field offices do not rely on law or regulation but on the Social Security Administration's internal rules, Program Operations Manual System (30,000 pages)[11] required to be followed by the Agency's low/first level adjudicators.

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[9] *Mathews v. Eldridge*, 424 U.S. 319 (1976) applied to people with modest income and was overruled by Congress by the 1984 reform amendments to the Social Security Act.

[10] Appendix A to Petition for Certiorari, Appendix A, Ex. 17.

[11] GAO Report, p. 15. FN 18, (Appendix B, Ex. 1, p. 9a)

V. CONCLUSION

Based on the foregoing, Petitioner requests that his Petition for Rehearing be granted.

Respectfully submitted,

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Attorney for Petitioner

Certification of Counsel (Rule 44)

I certify that the Petition for Rehearing is presented in good faith and not for delay. The grounds not covered heretofore include congressional findings in a July 2004 Government Accountability Office report (Appendix B, Ex. 1 of Petition for Rehearing) that Respondent applies different rules in its internal manual, Program Operations Manual System (POMS) than in law and regulations used at the Social Security Administration's Office of Hearings and Appeals where administrative law judges issue written decisions after hearings.

Dated: June 27, 2005

/s/ _____

Steven Bruce
Counsel for Petitioner

APPENDIX

Appendix B-i

TABLE OF CONTENTS[1]

Page

Exhibit 1. Excerpts from Government Accountability Office, formerly General Accounting Office, Report to the Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives dated July 2004 by The Social Security Administration entitled More Effort Needed to Assess Consistency of Disability Decisions. GAO-04-656 ..... 1a

[1] Counsel has reviewed scanned reproductions of original documents and certifies that to a substantial extent, they are true and correct replicas of the original documents.

EXHIBIT 1

United States General Accounting Office

Report to the Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives

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SOCIAL SECURITY ADMINISTRATION
More Effort Needed to Assess Consistency of Disability Decisions

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July 2004

GAO-04-656

[1] United States General Accounting Office
Washington, DC 20548

July 2, 2004

The Honorable E. Clay Shaw, Jr.
Chairman, Subcommittee on Social Security
Committee on Ways and Means
House of Representatives

Dear Mr. Chairman:

The Social Security Administration (SSA) is the nation's largest provider of income assistance to individuals with disabilities, paying $91 billion in federal benefits to 11.4 million beneficiaries with a disability and their families in 2003.[1] Each year, about 2.5 million people file claims with SSA for disability benefits. State agencies called Disability Determination Services (DDS) decide whether claimants meet SSA's definition of disability by applying SSA's decision-making criteria. If a DDS ultimately decides, after an initial determination and then a reconsideration of this decision, that a claimant does not meet SSA's definition for disability, the claimant may appeal to the hearings level, where an SSA Administrative Law Judge (ALJ) reviews the claim to decide if the claimant should be allowed benefits. About one-third of disability claims denied at the state level were appealed to the hearings level; of these, SSA's ALJs have allowed over one-half, with annual allowance rates fluctuating between 58 percent and 72 percent since 1985. While it is appropriate that

[1] The figures include federal payments for the Disability Insurance and the Supplemental Security Income programs to beneficiaries who have a disability or are blind and their families.

some appealed claims, such as those in which a claimant's impairment has worsened and prohibits work, be allowed benefits, representatives from SSA, the Congress, and interest groups have long been concerned that the high rate of claims allowed at the hearings level may indicate that decision makers at the two levels are interpreting and applying SSA's criteria differently. If this is the case, adjudicators at the two levels may be making inconsistent decisions that result in similar cases receiving dissimilar decisions.

Concerned about the possibility that adjudicators are making inconsistent decisions, SSA embarked on a "process unification" initiative in 1994 with [2] the goal of ensuring that adjudicators at both levels consistently apply SSA's policy guidance and make similar decisions on similar cases. Partly on the basis of early studies of potential causes of inconsistent decisions, SSA included in its process unification initiative efforts to provide consistent guidance to all adjudicators, clarify policy, provide training, test potential process changes, and perform a new quality review of allowances decided by ALJs. However, SSA continues to face challenges in its efforts to provide consistent disability decisions. These challenges, and others associated with modernizing its disability programs, contributed to our decision to include federal disability programs on our list of high-risk government programs.[2] In September 2003, SSA's Commissioner unveiled a new proposal that laid out the vision of a long-term strategy for improving the disability decision-making process and helping people with disabilities return to work. Several of the changes in the new proposal are intended to improve the accuracy, timeliness, and consistency of decisions, such as having the DDS decision makers more fully develop and

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[2] For additional information on the major problems facing federal disability programs and our decision to designate them as high-risk, see U.S. General Accounting Office, *High-Risk Series: An Update*, GAO-03-119, (Washington, D.C.: January 2003).

document their decisions, providing for centralized quality review of all decisions, and providing both adjudication levels equal access to medical expertise.

In response to your interest in the effectiveness of SSA's past and future efforts to improve and assess the consistency of decisions between levels, we evaluated these agency efforts. Specifically, we examined (1) the status of SSA's process unification initiative, (2) SSA's assessments of possible inconsistencies in decisions between adjudication levels, and (3) whether SSA's new proposal incorporates changes to improve consistency in decisions between adjudication levels.

To assess the extent to which SSA has implemented its planned activities under the initiative, we evaluated agency documentation describing SSA's process unification efforts. To evaluate SSA's efforts to assess consistency in decisions between levels, we interviewed officials from SSA's Office of Quality Assurance and Performance Assessment (OQA) and reviewed summary data and reports from SSA's quality assurance and performance management systems, including findings from SSA's Disability Hearings Quality Review, which is a quality review of DDS adjudicators' and ALJs' decisions and the associated case files. While we evaluated SSA's methods

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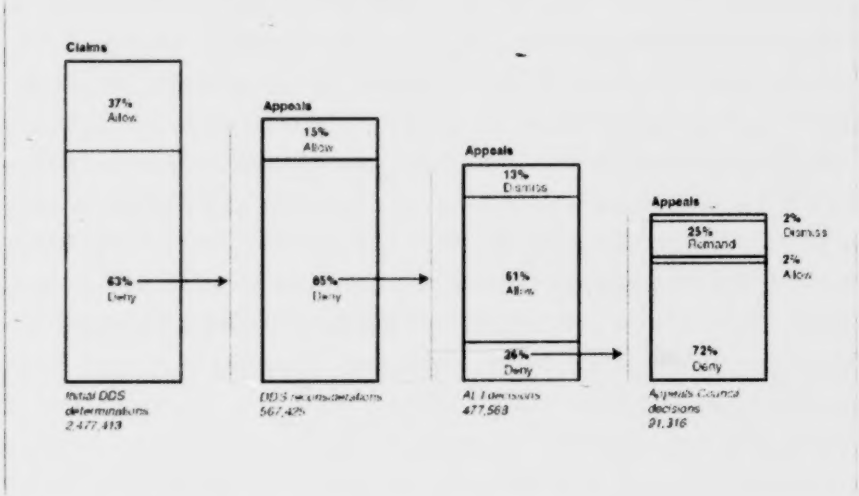
[7] Figure 1: SSA's Disability Decision-Making Process and Out-comes for Fiscal Year 2003



Source: SSA data

Notes:

The data provided by SSA did not include the number or rate of claims appealed to the next decision step. Without this information, we cannot determine the extent to which claimants appealed or abandoned their denied claims.

Twenty-five percent of the initial DDS determinations are subject to an alternative process that does not include the reconsideration step.

Under certain specified circumstances, ALJs and Appeals Council judges can dismiss a claim. For example, an ALJ can dismiss a claim if the claimant's request for a hearing is not timely and lacks a good cause for the delay.

The Appeals Council can remand a claim by returning it to an ALJ for further proceedings and a new hearing decision.

Because of rounding, decisional outcomes may not equal 100 percents

* * * *

[11] Despite SSA's process unification efforts and related studies to improve the consistency of decisions, recent ALJ allowance rates—which declined after process unification began, but started increasing in 1999 to reach 61 percent in fiscal year 2003—still raise questions as to whether initial- and hearings-level decision makers are consistently applying the agency's guidance. In addition to inconsistent application of SSA's policy guidance, there are several other reasons why a large number of ALJ allowances are made. For example, some ALJ allowances should be expected because, by law, cases can remain open throughout the hearings process, allowing new evidence to be submitted that may not have been available to the state adjudicators. Such new evidence could show that the claimant's condition has worsened and prohibits work. Also, SSA's decision-making criteria require that a great deal of professional judgment be applied. As a result, some allowances at the hearings level could simply reflect the differing judgments of two adjudicators reviewing a case. While a claimant's deteriorating health, changes in the characteristics of a claim over time, and the complexity of disability decisions may help to explain some of the ALJ allowances, studies have not sufficiently explained why consistently over half the cases appealed to the hearings level are allowed. Instead, studies indicate that systemic differences in the assessment of claims at both adjudication levels are contributing to the ALJ allowance rate. For example, our 1997 report noted a difference in state DDSs' and ALJs' views on the claimant's functional abilities was a key factor in explaining why ALJs allowed cases on appeal.

Inconsistency in decisions may create several problems. High hearings allowance rates may create the perception that the hearings level is applying SSA's criteria less strictly than the initial level and create an incentive for claimants to appeal to

an ALJ for a more favorable decision.[13] If deserving claimants must appeal to the hearings level for benefits, this situation increases the burden on claimants, who must wait, on average, almost a year for a hearing decision and frequently incur extra costs to pay [12] for legal representation.[14] In addition, to the extent that the ALJ allowance rates include inappropriate allowances, SSA could be incurring unwarranted program costs. Although SSA has tried to address these problems, its inability to resolve them has contributed to our decision to include federal disability programs on our list of high-risk government programs.[15]

Renewing its effort to address long-standing and critical problems with the disability programs, SSA's Commissioner recently announced a new proposal to improve these programs. (See app. I for an excerpt of the announcement that describes the newly proposed decision-making process.) In addition to proposing demonstration projects that provide work incentives and supports to help people with disabilities return to work, SSA has proposed significant changes to both the process of adjudicating disability claims and the structure and management of the agency's quality management system

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[13] An appeal adds significantly to costs associated with making a decision. According to SSA's Performance and Accountability Report for fiscal year 2001, the average cost per claim for an initial DDS disability decision was about $583, while the average cost per claim of an ALJ decision was an estimated additional $2,157.

[14] An appeal also significantly increases the time required to reach a decision. According to SSA's Performance and Accountability Report for fiscal year 2003, the average number of days that claimants waited for an initial decision was 97 days, while the number of days they waited for an appealed decision was 344 days. However, the time a claimant waits for a decision should not impact the amount of benefits received, as benefits are based on the date the claimant becomes disabled.

[15] U.S. General Accounting Office, *Performance and Accountability Series: Major Management Challenges and Program Risks: Social Security Administration*, GAO-03-117 (Washington, D.C.: January 2003).

to improve the timeliness, accuracy, and consistency of the disability decision-making process. The agency believes that several of these changes will help to improve consistency between DDS and ALJ decisions. For example, SSA plans to provide more centralized end-of-line quality reviews. According to SSA, the proposed quality reviews should help to hold adjudicators more accountable for their decisions and ensure that they consistently apply SSA's policies as well as help the agency detect and amend those policy areas leading to inconsistent decisions. Table 2 provides a description of SSA's proposed changes to improve the disability decision-making process.

* * * *

[14] implementing its new proposal. SSA's implementation of the new proposal will therefore be no earlier than October 2005. In the meantime, SSA continues to discuss the proposal with stakeholders and plans to further refine it before implementation.

SSA Has Partially Implemented Its Process Unification Initiative

SSA has partially implemented its process unification initiative. Although the agency initially made improvements in its policies and training intended to improve the consistency of decisions between adjudication levels, it has not continued to actively pursue these efforts. As part of the initiative, the agency also implemented a review of ALJs' allowance decisions to identify additional ways to improve training and policies, but no new changes were made as a result of findings from the review. Finally, the agency also began two tests of process changes to help improve the consistency of decisions, but one ongoing test with design problems is not likely to lead to any conclusive results and the other test has been abandoned.

SSA Made Early Progress Improving Policies and Training, but Has Not Actively Pursued These Efforts

While SSA initially made progress carrying out efforts to improve policies and training to better ensure the consistency of decisions, the agency has not continued to actively pursue these efforts. SSA quickly accomplished most of its planned efforts to clarify policy guidance. In 1996, SSA issued nine process unification rulings to clarify policy areas it found to be contributing to inconsistent decisions. For example, one ruling provided all adjudicators with guidance on how to weigh and document their evaluation of the treating physician's opinions when making a disability decision.[16] SSA successfully went through the regulatory process several years later and published three new regulations to strengthen its process unification rulings, but was unable to agree on a fourth regulation regarding the weight to be given to the treating physician's opinion when evaluating a claim.[17]

SSA planned to develop a single presentation of policy guidance to replace the different sources used by each level, but has since abandoned full implementation of these plans in favor of a more limited approach. DDS [15] adjudicators currently follow a detailed set of policy and procedural guidelines,[18] whereas ALJs rely directly on statutes, regulations, and rulings for guidance in making disability decisions. To help ensure that inconsistent guidance was not contributing to

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[16] *Social Security Ruling 96-2: Policy Interpretation Ruling Titles II and XVI: Giving Controlling Weight to Treating Source Medical Opinions*, effective July 2, 1996.

[17] Since SSA rulings are binding only on SSA adjudicators and do not have to be followed by the courts, SSA planned to strengthen the impact of several rulings by creating regulations that would be followed by the courts.

[18] These guidelines—called the Program Operations Manual System (POMS)—contain, within an estimated 30,000 pages, interpretations of relevant statutes, regulations, and rulings and procedural information.

inconsistent DDS and ALJ decisions, SSA began issuing guidance in the same wording to all adjudicators in 1996. Although SSA had also planned to address differences in policy guidance issued before 1996 and to eventually combine existing adjudication policy documents into a single document, it ultimately decided not to take these additional steps. According to SSA, further efforts to unify the policy guidance used by both levels would be a massive undertaking and not worth the cost because the guidance issued since 1996 had already addressed important policy areas that were leading to inconsistent decisions. While some stakeholder groups representing adjudicators tended to agree with SSA's position, the Social Security Advisory Board and other groups still believe the agency should take additional steps to provide a unified policy guide to all adjudicators. Instead of creating one policy manual for all adjudicators, SSA told us that it plans to undertake a comprehensive effort to evaluate and improve its disability policies to make them less susceptible to differing interpretations and to ensure they are up to date. A more comprehensive approach could address key weaknesses in SSA's disability program that we previously highlighted in our performance and accountability series, and thereby help to modernize federal disability programs to better meet the needs of Americans with disabilities.

Early on, SSA also provided extensive cross-training of DDS and ALJ adjudicators, although the scope of its efforts has since diminished. To help all adjudicators understand how to appropriately apply process unification rulings, SSA provided extensive and mandatory training in 1996 and 1997 to 15,000 disability adjudicators (including DDS examiners, physicians, ALJs, and quality assurance staff). The training was provided to adjudicators at all levels of the process in three of the most complex disability areas—assessment of symptoms, treatment of expert opinions, and assessment of claimants' remaining capacity to work (i.e., residual functional capacity). While this training was intended to be ongoing, SSA's training ef-

forts have diminished significantly since 1997. Stakeholder groups representing DDS adjudicators told us that SSA's training does not

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[23] both levels are making more consistent decisions. Although the 1994 report of findings from the initial biennial case review included the results of a special probe in which ALJs reviewed 165 DDS reconsideration denial decisions, the sample was not representative, and therefore results could not serve as a baseline for developing trend information. In 2003, SSA began another probe, in which ALJs reviewed 400 DDS reconsideration denial determinations, but the agency does not plan to release its findings until summer 2004.

Although SSA has limited information on how ALJs view DDS decisions, other information collected by the agency suggests that consistency of decision making at the initial level might not be improving. For example, OQA reviewers routinely assess the accuracy and supportability of DDS decisions. A recent SSA study of these data shows that the accuracy of DDS denial decisions—those decisions most likely to be appealed to the hearings level—has declined by 4 percentage points over a 1- year period.[26] Another review of DDS decisions by OQA reviewers also suggests a lack of improvement at the initial level. Specifically, the extent to which quality reviewers found that DDS reconsideration denials appealed to the hearings level were supported declined from 71 percent in fiscal year 1993-94 to 68 percent in fiscal year 1999-2000.

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[26] See the Social Security Administration, Office of Quality Assurance and Performance Assessment, *Quality Assurance Group I Initial Denial Accuracy Report: August-October 2002*, July 2003.

SSA's Assessments Have Not Identified the Areas and Causes of Possible Inconsistency in Decisions between Adjudication Levels

Despite some efforts to assess inconsistency in decisions, shortcomings in SSA's analyses also limit its ability to identify areas and causes of possible inconsistency. Most notably, over the last 10 years, SSA has not updated its prior analyses of information from its initial biennial case review that helped identify problem areas. In addition, SSA has not improved on its case review and analysis by ensuring that reviewers assess all relevant case evidence used to make decisions, or performed more sophisticated analysis to identify the areas and causes of inconsistency in decisions. Other efforts—including the review of ALJ allowances and a probe of DDS reconsideration denials—have yet to yield useful information.

In 1994, for its initial biennial case review report, the agency took its first step in identifying areas of possible inconsistency by identifying two characteristics about the claimants and their cases over which initial-level [24] reviewers tended to disagree with ALJs. Specifically, the 1994 report concluded that teams of reviewing medical consultants and disability examiners sometimes viewed cases involving mental impairments differently than the reviewing ALJs. In addition, these two sets of reviewers tended to have different views on the severity of claimants' impairments and their resulting capacity to work. According to the official responsible for overseeing the review, the findings in this initial report provided important support for SSA's process unification efforts as well as the agency's efforts to redesign the disability claims process.

SSA continues to conduct the biennial case reviews; however, the agency has not continued to analyze and identify areas that are viewed differently by different adjudication levels. Specifically, SSA no longer identifies the particular case characteristics over which reviewers from the two levels tend

to disagree. As a result, SSA does not know whether previously identified problem areas are still present. Moreover, SSA no longer publishes any information from the medical consultant and disability examiner biennial case reviews, even though it has performed some limited analysis of the supportability of decisions made by adjudicators. By not continuing to publish its analysis and findings, the agency makes it difficult to ensure the reliability of its methods and results, and leaves stakeholders outside the agency, including disability groups, without a means for understanding SSA's assessment efforts and progress in improving the consistency of decisions. The SSA office conducting the study has told us that, because of downsizing and competing priorities, it has no current plans to further analyze and publish these data.

Further, in its ongoing biennial case reviews, SSA does not make full use of available case information that would be useful in identifying areas and causes of inconsistency. Specifically, medical consultants and disability reviewers do not listen to tapes of the hearings and therefore do not review the entire case as presented to the original ALJ. Although reviewing medical consultants and disability examiners read the ALJs' explanations for their original decisions, which should include the most important factors behind the ALJs' decisions, the reviewers do not evaluate the oral evidence independently. An SSA official with whom we spoke indicated that some evidence entered by witnesses at the hearing might not be accompanied by other hard copy sources of the same information. Therefore, reviewers would not consider information potentially relevant to the ALJ's decision that could be used to identify areas and causes of inconsistency.

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[34] factors that might be contributing either appropriately or inappropriately to allowance decisions.

3. Expand the biennial case review by requiring disability examiners and medical consultants to review the hearing tapes to ensure that reviewers have the complete case before them (including the types and sources of testimonial evidence provided during the hearings) when evaluating the ALJs' decisions.

4. Have adjudicators and reviewers from each level study cases in depth to help pinpoint the causes of inconsistency, once potential areas of inconsistency between levels are identified.

5. Publish the methods and findings of all analyses, to keep internal and external stakeholders aware of the agency's efforts to assess consistency and demonstrate improvement over time.

6. Use the information from these improved analyses to develop a more focused and effective strategy for ensuring uniform application of SSA's guidance and to improve the consistency of decisions. To accomplish this, SSA should clarify guidance for making disability decisions and develop mandatory training for adjudicators on issues identified as contributing to inconsistency.

Agency Comments and Our Evaluation

We provided a draft of this report to SSA for comment. SSA expressed several reservations about the recommendations, findings, and conclusions of our report. Primarily, SSA took issue with: (1) our characterization of the agency's progress over the past several years in analyzing and reducing the inconsistency of decisions, (2) our recommendation that the agency incorporate multivariate analysis into its assessments, and (3) our finding that the agency has not acted on the results of its reviews of decisions. SSA indicated that it would

reevaluate our recommendations as the design of its Commissioner's new approach to disability decision making evolves. However, the agency did agree to pilot one recommendation—that quality reviewers assess hearing tapes when evaluating the ALJs' decisions—as part of a quality review.

One of SSA's main concerns was that our report did not fully discuss the progress SSA had achieved in analyzing and reducing the inconsistency in decision making between adjudication levels. For example, SSA commented that our report dismissed the 21-percentage point increase in the quality reviewers' support rate of ALJ decisions, conducted as part of [35] SSA's biennial case reviews over the last 10 years. SSA also pointed to findings from its ALJ peer reviews as additional evidence that the quality and consistency of SSA's decisions had improved. In addition, SSA asserted that its comparison of the relative proportion of allowances at the DDS and ALJ levels, along with high accuracy rates, indicated that adjudicators were making the right decisions sooner in the process—a goal of both process unification and the Commissioner's new disability approach. Although our report incorporates results from the analyses cited by SSA, our conclusion about the improvement in consistency between levels is not as optimistic as SSA's because of weaknesses in SSA's assessments. As we reported, SSA's analysis of the quality reviewers' assessment of ALJ cases has been limited for 10 years to calculating ALJ support rates. SSA has not used available data to determine the potential areas of inconsistency between levels or the extent to which changes in the ALJ support rate is related to improvements in consistency of decisions between adjudication levels. SSA's assessment also lacks a reliable method for determining whether DDS decisions are more consistent with ALJ decisions, for example, by having ALJs regularly review a statistical sample of DDS decisions. Lastly, as we pointed out, changes in the proportion of overall allowances made by the DDS and ALJ

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